

# CLIENT ALERT

## Employment, Labor & Immigration

September 2004

Volume VI No. 5

### Sexual Harassment Plaintiffs May Establish Emotional Distress with Minimal Proof

The New Jersey Supreme Court has made it easier for plaintiffs to establish emotional distress claims under the New Jersey Law Against Discrimination (the "LAD"). In *Tarr v. Bob Ciasulli, et al.*, the Court also clarified the standard for determining the individual liability of defendants accused of aiding and abetting a sexual harasser. In addition, the Court addressed whether a plaintiff who convinces a jury that he or she was sexually harassed but does not recover a damages award, may recover attorneys' fees as the prevailing party.

Although the *Ciasulli* decision helps both plaintiffs and defendants in different respects, it also, highlights the importance of employers taking preventative measures to reduce the likelihood that harassment occurs and, if it does, to address it properly.

#### Factual Background

Plaintiff Carol Tarr began working for defendant Mack Auto Mall in July 1994 as a Finance and Insurance Manager. She resigned from her job in July 1995, allegedly because she was being sexually harassed, but returned to work in August 1995 after her immediate supervisor assured her that the situation would improve. She then resigned a second time in April 1996, again due to alleged sexual harassment. Tarr alleged that her male co-workers and general manager constantly made offensive, sexual, and demeaning comments to her and in her presence. In addition, one employee would leave pornographic material on his desk and draw sexually explicit pictures. Another employee frequently propositioned her to have sex with him.

#### The Trial Court

Tarr filed a lawsuit against the company, the owner of the company, and various

employees for hostile work environment sexual harassment under the LAD.

At trial, Tarr testified that the male employees' conduct caused her constant embarrassment and often made her want to "crawl under her desk." She testified that she was so upset that she regularly cried on her way home from work.

At the close of Tarr's case, the trial court dismissed her claim for emotional distress, ruling that evidence that Tarr was temporarily upset was insufficient to establish an emotional distress claim under the LAD. At the close of the evidence, the trial court also dismissed her claim against the owner individually.

The jury found the company liable, but concluded that Tarr had not suffered any damages. Nonetheless, the trial court awarded Tarr attorneys' fees under the LAD, which provides for the awarding of fees to the "prevailing party."

#### The Supreme Court

The Supreme Court held: (1) the trial court erred in dismissing the emotional distress claim, as there was sufficient evidence to submit that claim to the jury; (2) the trial court properly dismissed the claim against the owner of the company, as there was insufficient evidence that he aided and abetted a violation of the LAD; and (3) the trial court erred in awarding attorneys' fees to the plaintiff, as she was not the prevailing party under the LAD.

#### Emotional Distress

The Supreme Court considered "whether the LAD permits a lower evidentiary threshold for recovery of [emotional distress] damages than is necessary to sustain a cause of action for intentional infliction of emotional distress." The Court concluded that it does. In reaching

Sills Cummis Epstein & Gross

A Professional Corporation

this conclusion, the Court relied on the 1990 amendment to the LAD, which authorized the recovery of emotional distress damages, and a string of state and federal cases which have held that neither expert testimony nor independent corroborative evidence is necessary to establish the “inconvenience and economic loss, physical and emotional stress, anxiety in searching for reemployment, uncertainty, career and family disruption and other adjustment problems ... [which] seem precisely the type [of damages] for which the Legislature intended compensation.” The Court also noted the broad purpose of the LAD to eradicate “the cancer” of discrimination.

Accordingly, the Court decided that “compensatory damages for emotional distress, including humiliation and indignity resulting from willful discriminatory conduct, are remedies that require a far less stringent standard of proof than that required for a tort-based emotional distress cause of action.” In other words, while a tort-based emotional distress cause of action requires distress so severe that no reasonable person can be expected to endure it, in discrimination cases, “the victim

may recover all natural consequences of [the defendant’s] wrongful conduct, including emotional distress and mental anguish damages arising out of embarrassment, humiliation, and other intangible injuries.”

#### Individual Liability

The Court considered the trial court’s dismissal of Tarr’s LAD claim against the owner of the company, who had not participated in the conduct that gave rise to the sexual harassment claims and had only limited involvement in managing the company.

In deciding the owner’s individual liability, the Supreme Court considered the definition of “aiding and abetting” under the LAD for the first time. The Court stated that a plaintiff alleging aiding and abetting must establish: (1) that the party being aided performed a wrongful act causing injury; (2) that the defendant was generally aware of his or her role in the tortious conduct; and (3) that the defendant knowingly and substantially assisted the principal violation.

Under this analysis, the Supreme Court held that the *Ciasulli* owner could not be personally liable under

the LAD. At most, the Court explained, he negligently supervised his employees, which does not amount to substantial assistance to the wrongdoers sufficient to impose individual liability for aiding and abetting.

#### Attorneys’ Fees

The Court addressed whether a plaintiff may recover attorneys’ fees under the LAD if the jury finds that he or she did not suffer any damages. The LAD provides that “the prevailing party may be awarded a reasonable attorney’s fee as part of the cost.” The Court held that to be a “prevailing party,” a plaintiff must recover some damages, injunctive relief, or a declaratory judgment. Notably, the Court held, however, that in cases in which the jury awards only nominal damages to a plaintiff, it is left to the trial court’s discretion as to whether or not to award attorneys’ fees.

*We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.*

### IMMIGRATION NEWSFLASH

#### Yearly Cap on H-1B Visas Likely to be Hit Early in Fiscal 2005

The Department of Homeland Security’s U.S. Citizenship and Immigration Services announced recently that, as of August 18, 2004, it had received 45,900 cap-subject H-1B (Professional/Specialty Worker category) filings subject to the fiscal year 2005 cap of 65,000 visas. The 2005 fiscal year does not commence until October 1, 2004. It is expected that the H-1B cap will be reached within the first few months of the fiscal year. While Congress is not in session, the White House has not indicated whether it will intervene. Companies that may be adversely impacted by not having the ability to hire foreign workers under the H-1B category are urged to contact their members of Congress.

For further Employment & Labor information, please contact:

David W. Garland, Co-Chair  
Employment & Labor  
973.643.6390

[dgarland@sillscummis.com](mailto:dgarland@sillscummis.com)

Lester Aron, Co-Chair  
Employment & Labor  
973.643.5795

[laron@sillscummis.com](mailto:laron@sillscummis.com)

For further Corporate Immigration information, please contact:

Susan Storch, Chair  
Corporate Immigration  
973.643.5983  
[sstorch@sillscummis.com](mailto:sstorch@sillscummis.com)

#### New Jersey

One Riverfront Plaza  
Newark, NJ 07102  
Tel: 973-643-7000  
Fax: 973-643-6500

[www.sillscummis.com](http://www.sillscummis.com)

#### New York

399 Park Avenue  
New York, NY 10022  
Tel: 212-643-7000  
Fax: 212-643-6550