

## LABOR & EMPLOYMENT LAW UPDATE

CLIENT ALERT

JUNE 2008

Jed L. Marcus, Esq.

### New Jersey Jury Awards Fired Employee \$10.7M for Age Discrimination

**Employers must be extremely careful when discharging employees, or implementing reductions in force or reorganizations.** The risk of discrimination lawsuits and huge jury verdicts hang in the balance. We always urge that employers seek the guidance of experienced labor and employment counsel before triggering a discharge. Recently, a New Jersey jury issued a powerful reminder that an employer's mistake can lead to discrimination lawsuits and large jury verdicts. On June 17, a Morris County jury awarded a 49 year old employee who was fired just one month shy of his 20th anniversary with the company \$10.7 million for intentional age discrimination. *Saffos v. Avaya*. According to the testimony at trial, a new supervisor fired everyone in Avaya's real-estate division, including the plaintiff, and replaced them mostly with young, attractive

women who had no experience in the field. The plaintiff was awarded \$743,000 in compensatory and \$10 million in punitive damages.



A smart employer is one who learns from its own mistakes. A wise employer learns from the mistakes of others. Adverse employment decisions should be carefully reviewed by human resource professionals and labor and employment counsel before these decisions are implemented. As always, decisions about performance, lay-offs and discharges should be based on objective facts that can withstand a jury's scrutiny. If the decision makers are unable to explain away a problem, a jury certainly isn't going to do it for them. ■

### New Jersey Supreme Court Explains Narrow Scope of Individual Liability Under the New Jersey Law Against Discrimination

**When plaintiffs' lawyers sue employers under the New Jersey Law Against Discrimination ("NJLAD"), they often bring in supervisors and co-employees as individual defendants.**

Plaintiffs think that bringing in individuals ratchets up the pressure on employers, but the real effect is to harden everyone's position and

to make settlement more difficult. In any event, the scope of individual liability is much narrower than most plaintiffs' lawyers think. Supervisors are not employers under the Act, and cannot be liable on that basis. Instead, individual liability under the NJLAD extends only to individuals who "aid, abet, incite, compel or coerce" the commission of acts prohibited under the statute. N.J.S.A. 10:5-12(e). It is insufficient that the individual failed to fulfill some duty statutorily required of the employer. Rather, the individual must have been affirmatively engaged in committing the discriminatory act, i.e., assisted,

*continued on next page*

# LABOR & EMPLOYMENT LAW UPDATE

## CLIENT ALERT

---

supported, encouraged, or supplemented the efforts of another in unlawful conduct. Courts have repeatedly held that the individual must also be aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance, and must knowingly and substantially assist the principal violation. *See, e.g., Tarr v. Bob Ciasulli*, 181 N.J. 70, 82-84 (2004); *Failla v. City of Passaic*, 146 F.3d 149, 158 (3d Cir. 1998); *Jones v. Jersey City Med. Ctr.*, 20 F. Supp. 2d 770, 774 (D.N.J. 1998).

On May 28, 2008, the New Jersey Supreme Court issued an important new decision that once again emphasizes the narrow range of conduct that will create individual liability. *Cicchetti v. Morris County Sheriff's Office*, No. A-102-06, slip op. (N.J. May 28, 2008). In *Cicchetti*, the plaintiff, alleging that he was subjected to a hostile work environment, sued his employer as well as various individuals, including the Sheriff. In dismissing the claims

against the individual defendants, the Court instructed that while a supervisor's conduct, when acting within the scope of his employment, may result in his employer's liability, it does not result in his own individual liability because a supervisor is not an employer under NJLAD. The Court observed that a trial court errs when it "confuse[s] the significance of a supervisor's act as a basis for an employer's liability with the significance of those same acts for purposes of the supervisor's individual liability." Individual liability can arise only through the "aiding and abetting" mechanism in the statute. In order to support individual liability under this theory, the individual defendant must have engaged in "active and purposeful conduct." Importantly, the Court held that the Sheriff was not an aider and abettor simply because he may have failed to act in such a way as to prevent discrimination. ■

---

## New York High Court Issues Wage and Hour Decision Favorable to Employers on the Issue of Commissions Calculation

**In *Pachter v. Bernard Hodes Group Inc.*, the New York State Court of Appeals held, among other things, that an employer is permitted to establish a commission formula that allows for the deduction of expenses *before* commissions become earned wages that must be paid to the employee.**

The plaintiff, a former commissioned employee, claimed that her employer improperly deducted business expenses

from her earnings. New York Labor Law prohibits employers from making deductions from the "wages" of employees, except for specific, authorized deductions for insurance, pensions, union dues and a few other purposes. Plaintiff operated under a commission plan that paid her commissions based on a formula in which finance charges, late fees, uncollectible bills to clients and part of the cost of her assistant were subtracted from a percentage of the sales she generated. The employer made the plaintiff repeatedly aware of these deductions over the course of her 11 years of employment with the company, and she never formally complained other

■  
...the New Jersey Supreme Court issued an important new decision that once again emphasizes the narrow range of conduct that will create individual liability...  
■

# LABOR & EMPLOYMENT LAW UPDATE

## CLIENT ALERT

---

than sending the employer one letter stating that she had concerns about the company's compensation calculations.

The Court made two important rulings. First, the Court held that executives are covered "employees" as defined in section 190(2). While other portions of the definition provisions of the Labor Law (in particular sections 190(5), (6) and (7)) carve out specific exemptions for executive employees, the Court noted that the law contains no such carve out in its definition of an employee under section 190(2). Thus, executives are entitled to the benefit of section 193's prohibitions on employer wage deductions.

Second, the Court held that the deductions were permissible. The law generally prohibits the type of deductions taken in this case prohibits because they were not "for the benefit of the employee." Indeed, under the common law, a commission is earned once the salesperson produces a ready, willing and able purchaser. However, the Court observed, the parties could depart from the common law by entering into an implied agreement (there was no written agreement) providing that the calculation of a commission would include

downward adjustments. The Court found that the parties departed from the common law based on their course of dealings over 11 years, which demonstrated commissions were not earned until after the employer subtracted expenses.

Employers can learn a lot from this case. All commission arrangements should be in writing so that the terms are expressly set out with no misunderstanding. Indeed, in October 2007, New York amended Section 191 to require written agreements for "commission salesperson," while excluding "executives." This means that the amended law would not have applied to the plaintiff in this case because she was an executive. But, a written agreement would have saved the employer a lot of time and money, not to mention aggravation. Instead of relying on an eleven year past practice, the employer could have provided all employees with its commission formula, thus avoiding litigation in the first place. Hence, our advice is simple: even if an employee is not a "commission salesperson" as defined in Section 191, employers should put their commission arrangements in writing and have it signed by all relevant employees. ■

*For more information about any of the topics covered in this issue of the Labor and Employment Law Update, Please contact:*

**Jed L. Marcus, Esq.**

*Labor & Employment Law Practice Group*

[jmarcus@bressler.com](mailto:jmarcus@bressler.com)

973.966.9678

973.514.1660 fax

## BRESSLER, AMERY & ROSS

A PROFESSIONAL CORPORATION

17 State Street  
New York, NY 10004  
212.425.9300

325 Columbia Turnpike  
Florham Park, NJ 07932  
973.514.1200

2801 SW 149th Avenue  
Miramar, FL 33027  
954.499.7979

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

This Update is provided as a general informational service to clients and friends of Bressler, Amery & Ross, P.C.

It should not be construed as imparting legal advice on any specific matter.

©2008 Bressler, Amery & Ross, P.C.  
All rights reserved.

ATTORNEY ADVERTISING