

Chapter 12

Discrimination on the Basis of Race, Religion, Color, National Origin, Ancestry, Marital Status, Domestic Partnership Status, Sexual Orientation, Genetic Information, Sex, Liability for Service in the Armed Forces, and Nationality

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A. STRATEGY

12.01 Scope.

This chapter covers the following with respect to the New Jersey Law Against Discrimination (“LAD”) and cases brought under the LAD:

- Protected Characteristics.
- Regulated Entities.
- Regulated Conduct.
- Affirmative Defenses.
- Available Remedies.

12.02 Objective and Strategy in Litigating LAD Claims.

While the LAD proscribes discrimination on the basis of a wide variety of protected characteristics, in varying contexts, this chapter will explore a limited range of this Act’s protections. Employment discrimination on the basis of race, religion, color, national origin, ancestry, marital status, domestic partnership status, sexual orientation, genetic information, sex, liability for service in the armed forces, and nationality under the LAD will be examined, from a substantive, as well as a practical, standpoint. Discrimination on the basis of age and disability and sexual harassment claims are explored in other chapters of this book. Although the analysis of these types of claims is in many ways similar to the analysis of claims based on the other statuses protected under the LAD, these types of claims are addressed in separate chapters because there are certain issues that are unique to them (e.g., mandatory retirement in connection with age discrimination claims, reasonable accommodation in connection with disability discrimination claims, and the standards of employer liability in connection with sexual harassment claims). The objective for the plaintiff in any employment discrimination case under the LAD is to establish that one of the aforementioned protected characteristics was a “determinative factor” in the way the employer acted toward the employee. From the defendant’s perspective, the objective is to demonstrate either that the plaintiff cannot establish a prima facie case and/or that no protected characteristic was a determinative factor in motivating the employer’s actions.

◆ **Cross-Reference:** Discussion, see 12.08 *below*.

With the exception of mixed-motive cases and affirmative defenses, the burden of proof remains with the plaintiff throughout the litigation.

◆ **Cross-Reference:** Discussion, see 12.08 *below*.

Thus, technically, there is no burden on the employer to “demonstrate” anything; however, as a practical matter, the defendant must advance a plausible

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non-discriminatory reason for its actions either to convince a judge to grant summary judgment or a directed verdict, or to persuade a jury to find no cause of action. Given the foregoing objectives, all strategy on both sides of employment discrimination litigation under the LAD must focus on the employer's motivations for its actions toward the employee.

Counseling Point: As in any matter, during the initial case screening phase, sufficient information must be gathered in order to properly ascertain the strengths and weaknesses of all potential claims. Additionally, it is important to gauge the range of remedies available, as well as to attempt to anticipate the likely defenses that may be raised.

◆ **Cross-Reference:** Form, see 12.12 *below* (Sample Intake Questionnaire).

B. CLIENT COUNSELING**12.03 CHECKLIST: Evaluate the Strength of the Potential Case.**

Determine if the potential client is protected under the LAD.

◆ **Cross-Reference:** Discussion, see 12.04 and 12.05 *below*.

Ensure that the potential defendant is subject to the LAD.

◆ **Cross-Reference:** Discussion, see 12.06 *below*.

Determine whether the defendant's actions are prohibited conduct under the LAD.

◆ **Cross-Reference:** Discussion, see 12.07 *below*.

Evaluate all available facts to assess the potential plaintiff's ability to satisfy the requisite standard of proof.

◆ **Cross-Reference:** Discussion, see 12.08 *below*.

Anticipate the likely affirmative defenses that potential defendant may raise.

◆ **Cross-Reference:** Discussion, see 12.09 *below*.

Analyze the range of possible remedies available in the case.

◆ **Cross-Reference:** Discussion, see 12.10 *below*.

Determine the appropriate venue for the case.

◆ **Cross-Reference:** Discussion, see 12.11 *below*.

Consider: The LAD is a statute of limited reach. It does not protect against all forms of discrimination or seek to right every wrong that may be suffered by an employee. It is a statute of enumerated protections, the majority of which are set forth below.

Client Counseling**12.04[2]****12.04 Protected Characteristics.**

12.04[1] Race and Color. Discrimination in employment on the basis of race and color has been proscribed by the LAD from its inception. Race refers to an individual's racial background, while discrimination on the basis of color refers specifically to an individual's skin color. [*See* Kearny Generating Sys., Div. of Pub. Serv. v. Roper, 184 N.J. Super. 253, 262, 445 A.2d 1159, 1163 (App. Div.), *certif. denied*, 91 N.J. 254, 450 A.2d 571 (1982)].

Consider: Reverse discrimination claims are also cognizable under the LAD, although such claims are subject to somewhat more stringent proof requirements. In such a case, the plaintiff must proffer evidence that supports an inference that the defendant is "the unusual employer who discriminates against the majority." [*See* Erickson v. Marsh & McLennan, 117 N.J. 539, 551, 569 A.2d 793, 799 (1990)]. However, it is worth noting that many federal courts have rejected the imposition of such an additional burden on reverse discrimination plaintiffs, and the imposition of such an additional burden only for plaintiffs who are white may very well not meet the strict scrutiny that the United States Supreme Court has imposed on *all* race-based government decisions. [*See, e.g.,* Iadimarco v. Runyon, 190 F.3d 151 (3d Cir. 1999) (holding that reverse discrimination plaintiffs need not carry any additional burden of proof); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (holding that all governmental race-based classifications must pass strict scrutiny)].

Consider: Even individuals who are not in a "protected class" may nevertheless have an actionable complaint under the LAD. The LAD protects not only members of the protected classes from discrimination in employment, but also those individuals who are treated as if they are members, either by perception or association. [*See* O'Lone v. N.J. Dept. of Corrections, 313 N.J. Super. 249, 255, 712 A.2d 1177, 1180 (App. Div. 1998)].

12.04[2] Religion. The LAD prohibits discrimination in employment on the basis of an individual's religious beliefs. Additionally, even if an individual does not actively practice a particular religion, but merely is perceived to be a member of a particular religious group, a religious discrimination claim may still be cognizable under the statute. [*See* Heitzman v. Monmouth County Reclamation Ctr., 321 N.J. Super. 133, 142, 728 A.2d 297, 302 (App. Div. 1999)].

Counseling Point: Since the LAD requires an employer to provide employees with reasonable accommodations for their religious beliefs, it is important to question your client about any such requests or discussions that may have taken place. If a reasonable accommodation that would not have unduly

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burdened the employer or co-workers was requested and was subsequently denied, the employer may have violated the LAD. [See DCR, Employment Guide to the LAD, pg. 10 (1989)].

Strategic Point — Defendant: The free exercise clause of the First Amendment to the United States Constitution may present an effective affirmative defense in a religious discrimination case. If the case presents a question regarding the internal workings of a religious entity, raising issues of faith and church doctrine, the “ministerial exception” may apply. [See *McKelvey v. Pierce*, 173 N.J. 26, 43–45, 800 A.2d 840, 850–851 (2002)]. If it is determined that the controversy is one that is truly religious, the First Amendment prohibits further court adjudication of the matter.

12.04[3] National Origin, Ancestry and Nationality. Discrimination in employment on the basis of national origin, ancestry or nationality is prohibited by the LAD. For purposes of the statute, national origin discrimination is differential treatment of a person based on the person’s country of origin (*e.g.*, discrimination against immigrants); ancestry discrimination is differential treatment of a person based on the person’s ethnic or national background (*e.g.*, discrimination against Italian-Americans); and nationality discrimination is differential treatment of a person based on the person’s citizenship (*e.g.*, discrimination against foreign nationals).

Consider: The LAD’s protected characteristics may overlap at times. Consequently, it is important that counsel fully evaluate the facts of a potential case to ensure that every possible claim is evaluated. For instance, an individual of Spanish descent who immigrated to the United States and remains a citizen of another country may reasonably be protected under the LAD with regard to that individual’s national origin *and* ancestry *and* nationality. Similarly, an individual who does not actively practice the Jewish faith, and thus may be prohibited from pursuing a religious discrimination claim, may nonetheless proceed with an ancestry discrimination claim if one of the individual’s parents is Jewish. [See *Heitzman v. Monmouth County Reclamation Ctr.*, 321 N.J. Super. 133, 142, 728 A.2d 297, 302 (App. Div. 1999)].

It is important to note that the classifications set forth in the LAD are limited to broad groups of individuals. Accordingly, an anti-nepotism policy would not violate the LAD’s prohibition of ancestry discrimination, because that prohibition is not directed at discrimination based on specific family relationships, but rather is directed at discrimination against “numerically significant segments of the population.” [See *Whateley v. Leonia Bd. of Educ.*, 141 N.J. Super. 476, 479–480, 358 A.2d 826, 827–828 (Ch. Div. 1976)].

Counseling Point: Workplace rules that indirectly implicate an employee’s national origin, ancestry or nationality do not necessarily violate the LAD.

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Thus, an “English only” rule does not contravene the statute absent some evidence that it was utilized for discriminatory purposes. [*See Rosario v. Cacace*, 337 N.J. Super. 578, 588, 767 A.2d 1023, 1029–1030 (App. Div. 2001)].

12.04[4] Marital Status. The LAD proscribes discrimination in employment on the basis of an individual’s marital status. Whether a particular individual is married, single, divorced or widowed cannot be a consideration in the terms and conditions of that individual’s employment. However, again, this prohibition is directed toward discrimination relating to the broad class of marital status, rather than specific family relationships. Therefore, an anti-nepotism policy that is enforced against employees related by blood or marriage would not violate the LAD. [*See Thomson v. Sanborn’s Motor Express, Inc.*, 154 N.J. Super. 555, 561, 382 A.2d 53, 56 (App. Div. 1977)].

Distinguish: Note that the Appellate Division has held that the LAD does not prohibit nepotism in employment based on “familial status.” In a case of first impression, the court in *Bumbaca v. Township of Edison*, [373 N.J. Super. 239, 861 A.2d 156 (App. Div. 2004)], explained that “familial status” is defined as

being the natural parent of a child, the adoptive parent of a child, the foster parent of a child, having a “parent and child relationship” with a child as defined by State law, or having sole or joint legal or physical custody, care, guardianship, or visitation with a child, or any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years [. . .]

[N.J. Stat. Ann. § 10:5-5 (II)], and held that the LAD only prohibits discrimination on that basis under the fair housing and other nonemployment-related provisions. [*Bumbaca v. Township of Edison*, 373 N.J. Super. 239, 249, 861 A.2d 156 (App. Div. 2004)]. The *Bumbaca* opinion also stands for the proposition that New Jersey has no public policy against nepotism in employment, and, therefore, that an employee who is terminated because he or she was hired as a result of nepotism cannot establish a *Pierce* claim of wrongful discharge. [*Bumbaca v. Township of Edison*, 373 N.J. Super. 239, 253, 861 A.2d 156 (App. Div. 2004)].

Consider: Note, however, that there are pending several amendments to the LAD that may be enacted in 2006, one of which would make discrimination in employment based on familial status unlawful. [*See New Jersey Legislative Session 2004-2005, Senate Bill No. 2522, Sections 1. and 2.*].

◆ **Cross-Reference:** Discussion, see 3.12 *above* (regarding *Pierce* claims).

Exception: N.J. Stat. Ann. § 10:5-2.1 provides that “[n]othing contained in this act . . . shall be construed to . . . interfere with the operation of

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the terms or conditions and administration of any bona fide retirement, pension, employee benefit or insurance plan or program.” Therefore, a provision in a pension plan that terminates benefits upon re-marriage does not offend the LAD. [*See* *Chausmer v. Comm’rs of the Employees’ Retirement Sys. of the City of Newark*, 150 N.J. Super. 379, 382, 375 A.2d 1205, 1207 (App. Div. 1977)].

Counseling Point: Even if a policy takes various factors into account, if a significant part of the policy is based on an employee’s marital status, it will be deemed violative of the LAD. [*See* *Slohoda v. U.P.S., Inc.*, 193 N.J. Super. 586, 590, 475 A.2d 618, 620 (App. Div. 1984)].

12.04[5] Domestic Partnership Status. The LAD prohibits employers from treating employees differently because of domestic partnership status. The statute defines a domestic partnership as a domestic partnership established under New Jersey law. [*See* N.J. Stat. Ann. § 10:5-5(qq)]. The New Jersey Domestic Partnership Act provides gay and lesbian couples with a functional equivalent to marriage for legal and financial purposes. [*See* N.J. Stat. Ann. § 26:8A-1 *et seq.*].

12.04[6] Sexual Orientation. The LAD prohibits discrimination in employment on the basis of an individual’s sexual orientation, which is defined as male or female heterosexuality, homosexuality, or bisexuality. The statute also protects individuals perceived as having a particular orientation. [*See* N.J. Stat. Ann. § 10:5-5(hh)]. Although the LAD’s sexual orientation discrimination ban does not protect transsexuals, transsexualism has been held to be a protected handicap under the LAD. [*See* *Enriquez v. W. Jersey Health Sys.*, 342 N.J. Super. 501, 511, 520, 777 A.2d 365, 371, 376 (App. Div.), *certif. denied*, 170 N.J. 211, 785 A.2d 439 (2001)].

◆ **Cross-Reference:** Discussion, see 12.04[7] *below*.

12.04[7] Genetic Information. Discrimination in employment on the basis of an individual’s genetic information is prohibited by the LAD. Genetic information is defined as “the information about genes, gene products or inherited characteristics that may derive from an individual or family member.” [*See* N.J. Stat. Ann. § 10:5-5(nn)]. The LAD further proscribes discrimination in employment because of an individual’s refusal to (1) submit to genetic testing or (2) provide the results of such genetic testing to an employer. [*See* N.J. Stat. Ann. § 10:5-12(a)]. As of the writing of this chapter, there are no reported cases interpreting this provision of the LAD.

12.04[8] Sex. The LAD prohibits unequal treatment of employees on the basis of sex. As used in this statute, “sex embraces an individual’s gender,

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and is broader than anatomical sex.” [See *Enriquez v. W. Jersey Health Sys.*, 342 N.J. Super. 501, 515, 777 A.2d 365, 373 (App. Div.), *certif. denied*, 170 N.J. 211, 785 A.2d 439 (2001)]. As such, a transsexual subject to employment discrimination based on gender stereotyping would be protected under this statute. [See *Enriquez v. W. Jersey Health Sys.*, 342 N.J. Super. 501, 515–516, 777 A.2d 365, 373 (App. Div.), *certif. denied*, 170 N.J. 211, 785 A.2d 439 (2001)]. Similarly, pregnancy discrimination is prohibited by the LAD’s prohibition of sex discrimination because only women can become pregnant. [See *Rendine v. Pantzer*, 141 N.J. 292, 661 A.2d 1202 (1995)].

12.04[9] Liability for Service in the Armed Forces. The LAD protects individuals against discrimination in employment on the basis of liability for service in the Armed Forces of the United States. The statute defines this protected class as persons

subject to being ordered as an individual or member of an organized unit into active service in the Armed Forces of the United States by reason of membership in the National Guard, naval militia or a reserve component of the Armed Forces of the United States, or subject to being inducted into such armed forces through a system of national selective service. [See N.J. Stat. Ann. § 10:5-5(g)].

Caution: Determining whether the potential plaintiff is a member of a protected class under the LAD is only the first of many issues that must be analyzed before committing to litigation. Just as the LAD is limited with respect to the types of discrimination it proscribes, it is similarly limited with respect to the groups of individuals who can derive protection from its proscriptions.

12.05 Determine Whether the Potential Plaintiff is Protected Under the LAD.

12.05[1] Job Applicants. The LAD protects job applicants from discrimination on the basis of the protected characteristics in the statute. Additionally, employers and employment agencies are specifically prohibited from making pre-employment inquiries that implicate any of the protected classifications in a discriminatory manner unless required for a bona fide occupational qualification. [See N.J. Stat. Ann. § 10:5-12(c)].

◆ **Cross-Reference:** Discussion, *see* 12.09[1] *below*.

12.05[2] Persons Employed in New Jersey. The LAD protects New Jersey employees from workplace discrimination, although individuals employed in the domestic service of another are exempted from this statute’s protections. [See N.J. Stat. Ann. § 10:5-5(f)].

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12.05[3] Independent Contractors. Independent contractors are not entitled to the protections afforded by N.J. Stat. Ann. § 10:5-12(a) because that statutory section is limited to discrimination in employment. [See *Pukowsky v. Caruso*, 312 N.J. Super. 171, 180, 711 A.2d 398, 403 (App. Div. 1998)]. However, N.J. Stat. Ann. § 10:5-12(l) protects independent contractors from discrimination. [See *Rubin v. Forest S. Chilton, 3RD, Memorial Hospital, Inc.*, 359 N.J. Super. 105, 819 A.2d 22 (App. Div. 2003)].

Consider: Note, however, that there are pending several amendments to the LAD that may be enacted in 2006, one of which would expand the statute's definition of "employee" to include certain independent contractors, thereby entitling eligible independent contractors to its protections. [See New Jersey Legislative Session 2004-2005, Senate Bill No. 2522, Section 2.].

Exception: It remains an open question whether or not a hostile work environment claim (as opposed to a discrimination claim based on an adverse employment action such as a wrongful discharge) by an independent contractor is cognizable under N.J. Stat. Ann. § 10:5-12(l). (However, as explained in the sexual harassment chapter of this book, an employer can be held liable to one of its employees for a hostile work environment created by an independent contractor).

Exception: In *Pukowsky v. Caruso*, the Appellate Division held that an independent contractor could not bring a claim for a sexually hostile work environment under N.J. Stat. Ann. § 10:5-12(a), which by its plain terms regulates only the conduct of employers. [Pukowsky v. Caruso, 312 N.J. Super. 171, 711 A.2d 398 (App. Div. 1998)]. However, a review of the court's opinion leads to the conclusion that plaintiff's counsel in that matter did not argue that independent contractors are protected under N.J. Stat. Ann. § 10:5-12(l), which prohibits any person from

refus[ing] to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of the race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, domestic partnership status, liability for service in the Armed Forces of the United States, disability, nationality, or source of lawful income used for rental or mortgage payments of such other person or of such other person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers.

That statutory provision was the basis for the holding in *Rubin v. Forest S. Chilton, 3RD, Memorial Hospital, Inc.*, that two doctors whose contracts to provide pathology services to a hospital were terminated could bring a

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claim under the LAD alleging that the contracts were terminated because of their age. [*Rubin v. Forest S. Chilton, 3RD, Memorial Hospital, Inc., 359 N.J. Super. 105, 819 A.2d 22 (App. Div. 2003)*].

Approximately three months after one panel of the Appellate Division issued the *Rubin* opinion, another panel of the court relied on the *Pukowsky* decision to bar a hostile work environment sexual harassment claim by an independent contractor. [*See Chrisanthis v. County of Atlantic, 361 N.J. Super. 448, 825 A.2d 1192 (App. Div.), certif. denied, 178 N.J. 31, 834 A.2d 404 (2003)*]. Curiously, the *Chrisanthis* opinion made no reference to either the *Rubin* decision or the LAD independent contractor provision at N.J. Stat. Ann. § 10:5-12(l). Thus, although the opinions in *Pukowsky* and *Chrisanthis* support the conclusion that independent contractors cannot bring hostile work environment claims under the LAD, both of those decisions are suspect due to their failure to acknowledge and distinguish the *Rubin* opinion and N.J. Stat. Ann. § 10:5-12(l).

From a defense perspective, it could be argued that the language of the LAD independent contractor provision makes no reference to the terms and conditions under which business is conducted or to the concept of a hostile work environment, but rather only prohibits the outright refusal to do business with persons on the basis of those persons' protected characteristics. However, the employment provision of the LAD also does not make reference to the concept of a hostile work environment [*see* N.J. Stat. Ann. § 10:5-12(a)], and the courts have clearly held that hostile work environment claims can be brought under that provision. [*See Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 626 A.2d 445 (1993)*]. In short, until an appellate court in New Jersey issues an opinion that both distinguishes the *Rubin* decision and the LAD independent contractor provision in rejecting a LAD hostile work environment claim by an independent contractor, the argument that independent contractors may bring LAD hostile work environment claims remains viable.

Consider: Once it has been determined that the potential plaintiff is protected under the LAD, the next step is to ensure that the potential defendant is subject to the statute's proscriptions. The LAD's prohibitions are directed toward all employers, employment agencies and labor organizations in New Jersey, regardless of the size of the entity. Moreover, the LAD defines "employer" so as to include the State, as well as any political or civil subdivision of the State, and all public officers, agencies, boards or bodies. [*See* N.J. Stat. Ann. § 10:5-5(e)]. Agency principles apply when determining employer liability under the LAD. [*See Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 619, 626 A.2d 445, 461 (1993)*]. The LAD also regulates the conduct of individual employees and third parties under certain circumstances, as explained in the next section.

12.06[1]**Discrimination****12.06 Determine Whether the Potential Defendant is Subject to the LAD.**

12.06[1] Supervisors. The New Jersey Supreme Court has held that although an individual supervisor does not fall within the definition of “employer” under the LAD, supervisors can be held individually liable for aiding and abetting conduct prohibited by the statute. [*Tarr v. Bob Ciasulli’s Mack Auto Mall, Inc.*, 181 N.J. 70, 83, 853 A.2d 921 (2004)]. The LAD prohibits “any person, whether an employer or an employee or not” from aiding, abetting, inciting, compelling, or coercing “the doing of any of the acts forbidden [under the statute].” [N.J. Stat. Ann. § 10:5-12(e)]. The *Tarr* court noted that individual supervisors cannot be held liable as aiders and abettors solely based on their negligent supervision of subordinate employees who engage in unlawful discrimination. [*Tarr v. Bob Ciasulli’s Mack Auto Mall, Inc.*, 181 N.J. 70, 853 A.2d 921 (2004)]. Rather, to establish aiding and abetting liability, a plaintiff must demonstrate that (1) the party who was aided and abetted committed a wrongful act that caused an injury; (2) the aider and abettor was aware that he or she was participating in illegal or tortious activity at the time that he or she provided assistance; and (3) the aider and abettor knowingly and substantially assisted the principal violation. [*See Tarr v. Ciasulli*, 181 N.J. 70, 84, 853 A.2d 921, 929 (2004)].

Prerequisite: While it remains an open question, as the New Jersey Supreme Court has not yet ruled on it, courts have held that in order to be subject to individual aider and abettor liability under the LAD, the defendant must have had supervisory authority over the plaintiff. [*See Herman v. The Coastal Corp.*, 348 N.J. Super. 1, 27, 791 A.2d 238, 254 (App. Div.), *certif. denied*, 174 N.J. 363, 807 A.2d 195 (2002)]. Therefore, this initial inquiry is necessary in order to determine whether individual liability under N.J. Stat. Ann. § 10:5-12(e) is justified. If a defendant had the authority to affect the terms and conditions of the plaintiff’s employment, such as the authority to hire, fire, discipline, and control the plaintiff’s wages or schedules, the defendant will likely be found to be a supervisor for purposes of N.J. Stat. Ann. § 10:5-12(e) liability. [*See Cavuoti v. New Jersey Transit Corp.*, 161 N.J. 107, 123–124, 735 A.2d 548, 558 (1999)]. However, the absence of these factors will not negate a finding of supervisory authority as long as the plaintiff reasonably perceived that the individual defendant had the power to affect such terms and conditions of employment. [*See Entrot v. The BASF Corp.*, 359 N.J. Super. 162, 819 A.2d 447 (App. Div. 2003)].

◆ **Cross-Reference:** Discussion, see 12.07[3] *below*.

12.06[2] Co-Workers. Although lower courts have found that non-supervisory employees cannot be held individually liable under the LAD [*see Herman v. Coastal Corp.*, 348 N.J. Super. 1, 791 A.2d 238 (App. Div.), *certif. denied*, 174 N.J. 363, 807 A.2d 195 (2002)], those decisions fly in

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the face of the plain language of the statute, prior decisions of the New Jersey Supreme Court and the Appellate Division, and basic principles of agency law. First, both the aiding-and-abetting and anti-retaliation provisions of the statute prohibit wrongful conduct by “any person,” not “any supervisor.” [See N.J. Stat. Ann. §§ 10:5-12(d) and (e)]. Second, at least two New Jersey Supreme Court decisions and one Appellate Division decision have analyzed individual liability under the LAD without any discussion of whether the individual defendant was a supervisor or not, thereby implying that the issue is irrelevant. [See *Tarr v. Ciasulli*, 181 N.J. 70, 84, 853 A.2d 921, 929 (2004); *Andersen v. Exxon Co., U.S.A.*, 89 N.J. 483, 502, 446 A.2d 496 (1982); *Baliko v. Stecker*, 275 N.J. Super. 182, 191, 645 A.2d 1218, 1223 (App. Div. 1994)]. Third, basic principles of agency law require that the wrongdoing agent be held liable when his or her principal is held liable because of his or her wrongful conduct. [See *Davi v. Cabana Pools, Inc.*, 135 N.J. Super. 372, 378, 343 A.2d 478, 481 (App. Div. 1975)]. Thus, until the New Jersey Supreme Court rejects individual liability for non-supervisors under the LAD, the argument remains quite viable.

12.06[3] Customers/Clients/Vendors. Employers may be liable under the LAD for any acts of harassment perpetrated by non-employees while conducting business in the employer’s work environment or while the employee is on company business if the employer is aware (or should be aware) of the harassment and takes no measures to correct the conduct. [See *Woods-Pirozzi v. Nabisco Foods*, 290 N.J. Super. 252, 269, 675 A.2d 684, 692 (App. Div. 1996)].

12.07 Determine Whether the Potential Defendant’s Actions Are Prohibited Conduct Under the LAD.

12.07[1] Discriminatory Employment Decisions. The LAD prohibits discrimination in employment on the basis of any of the protected characteristics articulated above. Discriminatory decisions that change the terms or conditions of an individual’s employment, such as hiring, firing, promotion, or demotion decisions, are therefore actionable under this statute. [See N.J. Stat. Ann. § 10:5-12(a)]. Whether an adverse employment decision is a discrete, isolated incident or is based on a company-wide policy, if at its core it discriminates on the basis of one of the LAD’s protected characteristics, it is forbidden by that statute.

Caution: As important as it is to analyze thoroughly the facts and circumstances of a potential claim, it is equally important to be familiar with the limitations on a claim. The LAD contains several exceptions that operate to limit its scope. One such exception bars LAD claims relating to State

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employee benefit programs. [See N.J. Stat. Ann. § 10:5-2.1]. Similarly, a loss of consortium claim is not viable under the LAD. [See *Catalane v. Gilian Instrument Corp.*, 271 N.J. Super. 476, 500, 638 A.2d 1341 (App. Div. 1994), *certif. denied*, 136 N.J. 298, 642 A.2d 1006 (1994)].

Drafting Point: If the plaintiff was not fired, but rather left the place of employment due to a discriminatory environment, careful drafting of the complaint is essential to ensure that plaintiff's actions are not characterized as job abandonment. A constructive discharge exists when an employer knowingly allowed discriminatory conditions in the workplace, and such conditions were so intolerable that a reasonable person who was subjected to them would have resigned. [See *Muench v. Township of Haddon*, 255 N.J. Super. 288, 302, 605 A.2d 242, 249 (App. Div. 1992)]. The complaint must show that the plaintiff was subjected to discriminatory conduct that was severe or pervasive. [See *Shepherd v. Hunterdon Develop. Ctr.*, 174 N.J. 1, 28, 803 A.2d 611, 628 (2002)]. In addition, a constructive discharge claim will not be viable if the complaint does not demonstrate that the plaintiff acted reasonably and attempted to remain employed. Factors that the New Jersey Supreme Court has considered important in determining whether or not a constructive discharge claim is viable in a sexual harassment case are as follows:

- (1) the nature of the discrimination,
- (2) the closeness of the working relationship between the wrongdoer and the plaintiff,
- (3) whether the plaintiff resorted to any internal grievance procedures,
- (4) the responsiveness of the employer to the plaintiff's complaint, and
- (5) all other relevant circumstances.

[See *Shepherd v. Hunterdon Develop. Ctr.*, 174 N.J. 1, 28, 803 A.2d 611, 627 (2002)]. All of these considerations should be carefully evaluated at the pleading stage of litigation.

12.07[2] Retaliation. Retaliatory actions taken against any individuals who availed themselves of the protections of the LAD are forbidden. [See N.J. Stat. Ann. § 10:5-12(d)]. The elements of a prima facie case of retaliation are that:

- (1) plaintiff engaged in protected activity that was known to the employer;
- (2) plaintiff was subject to an adverse employment decision; and
- (3) there is a causal link between the protected activity and the adverse decision.

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[*See Woods-Pirozzi v. Nabisco Foods*, 290 N.J. Super. 252, 274, 675 A.2d 684, 695 (App. Div. 1996)].

Consider: The determination of whether the activity engaged in is protected activity is governed by the employee's reasonable belief, as opposed to the underlying merits of the claim. [*See Drinkwater v. Union Carbide Corp.* 904 F.2d 853, 866 (3d Cir. 1990)].

Example: While temporal proximity between the protected activity and the adverse action may support an inference of causal connection, it is not the only circumstance that may do so. [*See Romano v. Brown & Williamson Tobacco Corp.*, 284 N.J. Super. 543, 550, 665 A.2d 1139, 1142–1143 (App. Div. 1995)]. Once the plaintiff sets forth a prima facie case, the defendant has the burden of production to articulate a non-retaliatory reason for its decision. The plaintiff then has the ultimate burden of persuasion to show that the defendant's action was motivated by unlawful retaliatory reasons. [*See Chou v. Rutgers, The State Univ.*, 283 N.J. Super. 524, 538–539, 662 A.2d 986, 993 (App. Div. 1995), *certif. denied*, 145 N.J. 374, 678 A.2d 714 (1996)].

12.07[3] Aiding and Abetting. The LAD also prohibits individuals from aiding and abetting the discriminatory conduct of another. [*See N.J. Stat. Ann.* § 10:5-12(e)].

The New Jersey Supreme Court has adopted the definition of “aiding and abetting” set forth in *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 129 (3d Cir. 1999), *cert. denied*, 528 U.S. 1074, 120 S.Ct. 786 (2000), and in § 876(b) of the Restatement (Second) of Torts (1979). Specifically, it held that

in order to hold an employee liable as an aider or abettor, a plaintiff must show that ‘(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation.’ With respect to that determination, the comments to [Restatement (Second) of Torts § 876(b)] provide a list of five factors, relied on by the *Hurley* court, to assess whether a defendant provides “substantial assistance” to the principal violator. Those factors are: (1) the nature of the act encouraged, (2) the amount of assistance given by the supervisor, (3) whether the supervisor was present at the time of the asserted harassment, (4) the supervisor's relations to the others, and (5) the state of mind of the supervisor.

[*Tarr v. Bob Ciasulli's Mack Auto Mall, Inc.*, 181 N.J. 70, 84, 853 A.2d 921 (2004)].

12.08[1]**Discrimination****12.08 Evaluate All Available Facts to Assess the Potential Plaintiff's Ability to Satisfy the Requisite Standard of Proof.**

12.08[1] Disparate Treatment—Pretext. Disparate treatment claims allege that an employer treats a particular individual, or group of individuals, less favorably than others simply because of a protected characteristic. Proof of discriminatory intent is required. However, it is widely recognized that often direct evidence of discriminatory intent is unavailable. This understanding has led to the acceptance of circumstantial evidence to prove discriminatory intent. [*See Maiorino v. Schering Plough Corp.*, 302 N.J. Super. 323, 345, 695 A.2d 353, 365 (App. Div. 1997), *certif. denied*, 152 N.J. 189, 704 A.2d 19 (1997)]. When pursuing a disparate treatment claim through the use of circumstantial evidence, the plaintiff has the initial burden of setting forth a prima facie case of discrimination. Although the requisite proof varies according to the asserted claim, generally the elements of a prima facie case of discrimination are as follows:

- (1) the plaintiff belongs to a protected class,
- (2) the plaintiff was objectively qualified for the job,
- (3) the plaintiff was subjected to an adverse job action, and
- (4) there were other circumstances that give rise to an inference of discrimination (*e.g.*, replacement by a person whose protected characteristic differs from the plaintiff's, or in the case of a lay-off, retention of persons whose protected characteristic differs from the plaintiff's). [*See Williams v. Pemberton Twp. Public Schools*, 323 N.J. Super. 490, 498–503, 733 A.2d 571, 576–578 (App. Div. 1999)].

● **Warning:** The analysis of the second prong of the prima facie case focuses solely on the plaintiff's objective qualifications for the job (*e.g.*, having a law degree to be a lawyer). If the employer asserts as its non-discriminatory reason for the adverse employment action that the plaintiff was not subjectively qualified for the job (*e.g.*, the plaintiff's job performance was inadequate), that qualifications issue is not considered until the third stage of the circumstantial evidence analysis (*i.e.*, the stage at which the court considers whether the plaintiff has adduced sufficient evidence of pretext). [*See, e.g., Viscik v. Fowler Equip. Co., Inc.*, 173 N.J. 1, 21, 800 A.2d 826, 837, 838 (2002)(holding in handicap discrimination case that prima facie job performance standard is objective); *Baker v. National State Bank*, 312 N.J. Super. 268, 284–85, 711 A.2d 917, 925–26 (App. Div. 1998) (holding in age discrimination case that prima facie job performance standard is objective), *aff'd*, 161 N.J. 220, 736 A.2d 462 (1999)]. Indeed, the New Jersey Supreme Court has held that to establish the second element of a prima facie case, “[a]ll that is necessary is that the plaintiff produce

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evidence that she was actually performing the job prior to the termination.” [See *Zive v. Stanley Roberts, Inc.*, 182 N.J. 436, 454, 867 A.2d 1133, 1143 (2005)].

Once the plaintiff sets forth the requisite prima facie showing, the burden of production shifts to the defendant, who must articulate a legitimate, non-discriminatory reason for its decision. If the defendant satisfies this burden of production, the plaintiff must show by a preponderance of the evidence that the proffered reason articulated by the defendant was not the true reason for the decision, but was merely a pretext for discrimination. [See *Mogull v. CB Commercial Real Estate Group, Inc.*, 162 N.J. 449, 744 A.2d 1186 (2000)].

Consider: To demonstrate pretext, a plaintiff must show either (1) a discriminatory reason more likely motivated the defendant than the defendant’s proffered legitimate reason, or (2) the defendant’s proffered explanation is “unworthy of credence.” [See *Maiorino v. Schering Plough Corp.*, 302 N.J. Super. 323, 347, 695 A.2d 353, 365 (App. Div.), *certif. denied*, 152 N.J. 189, 704 A.2d 19 (1997)]. Put another way, the plaintiff can either prove that while the defendant’s proffered legitimate reason is true (e.g., the plaintiff was insubordinate) that was not the motivating factor for the adverse employment action (e.g., other employees who were insubordinate suffered no adverse action), or the plaintiff can prove that the employer’s proffered legitimate reason is false (e.g., the plaintiff’s job performance was not insubordinate). If the plaintiff successfully rebuts defendant’s non-discriminatory reason, the jury may, but need not, infer that the defendant intentionally discriminated against the plaintiff. Throughout the litigation, the plaintiff always retains the ultimate burden of persuasion. [See *Maiorino v. Schering Plough Corp.*, 302 N.J. Super. 323, 348, 695 A.2d 353, 365 (App. Div.), *certif. denied*, 152 N.J. 189, 704 A.2d 19 (1997)].

Consider: In a gender discrimination wage disparity case brought pursuant to the LAD, a prima facie case is established when a plaintiff shows that unequal pay was given for “substantially equal” work. If a plaintiff satisfies this prima facie showing, the burden of persuasion shifts to the defendant to prove that one of the Federal Equal Pay Act affirmative defenses applies. [See 29 USCS § 206(d)]. Alternatively, if plaintiff’s proofs only establish that the work in question is “similar,” then the typical disparate treatment formula applies and the ultimate burden of persuasion remains on the plaintiff throughout the litigation. [See *Grigoletti v. Ortho Pharmaceutical Corp.*, 118 N.J. 89, 110, 570 A.2d 903, 913 (1990)].

12.08[2] Disparate Treatment—Mixed Motive. Under a mixed-motive analysis, once the plaintiff offers sufficient evidence of discrimination, the burden of persuasion shifts to the defendant to prove by a preponderance of the evidence that it would have taken the same action even without

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considering the discriminatory factor. [*See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)]. Until the United States Supreme Court issued its decision in *Desert Palace, Inc. v. Costa*, most if not all courts held that a plaintiff must present direct (as opposed to circumstantial) evidence of discrimination to trigger a mixed-motive analysis so as to shift the burden of persuasion to the defendant. [*Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)].

However, in *Desert Palace*, the Supreme Court held that under the amendments to Title VII of the federal Civil Rights Act of 1964 codified in the Civil Rights Act of 1991, a plaintiff need only demonstrate that discrimination was a motivating factor for the challenged employment decision to utilize a mixed-motive analysis, regardless of whether the plaintiff meets that burden of proof by direct or circumstantial evidence. Thus, any type of evidence that the adverse employment action was motivated by discrimination will shift the burden of persuasion to the defendant.

The Appellate Division has applied *Desert Palace* to a case brought under the New Jersey Law Against Discrimination, despite the fact that the United States Supreme Court's holding in *Desert Palace* was based specifically upon the statutory language of the Civil Rights Act of 1991, which has no bearing on the New Jersey Law Against Discrimination. [*See Myers v. AT&T*, 380 N.J. Super. 443 (App. Div. 2005)]. However, to date, there is little or no case law providing guidance as to what quantum of evidence suffices to prompt a mixed-motive analysis in light of *Desert Palace's* rejection of the direct-evidence requirement. For example, it remains unclear whether the mere proof of a prima facie case is enough to shift the burden of persuasion to the defendant. If so, every claim could proceed under both a pretext analysis and a mixed-motive analysis. If that is the case, then a number of other questions arise. Is the plaintiff permitted or required to elect between the two analyses; or, does the court decide which mode of proof applies; or, does the defendant decide whether to assert the mixed-motive affirmative defense that it would have taken the same actions anyway; or, should every claim be analyzed under both tests? All of these issues remain unresolved.

12.08[3] Disparate Impact. Disparate impact claims differ from disparate treatment claims in one important respect: proof of discriminatory motive is not a requirement in a disparate impact case. [*See Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 82, 389 A.2d 465, 478–479 (1978)]. Rather, disparate impact cases are directed toward facially neutral employment policies and practices that have a disproportionate negative effect on a protected group. [*See Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 81–82, 389 A.2d 465, 478 (1978)]. Once such a policy is identified, the defendant has two avenues it can pursue. The defendant can challenge

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the plaintiff's initial proposition by demonstrating that the policy in question, in fact, does not cause a disparate impact on a protected group. Alternatively, the defendant can demonstrate that the challenged policy is job-related and consistent with business necessity. [*See Esposito v. Township of Edison*, 306 N.J. Super. 280, 290, 703 A.2d 674, 679–680 (App. Div. 1997), *certif. denied*, 156 N.J. 384, 718 A.2d 1212 (1998)].

A plaintiff can also establish liability for disparate impact discrimination by demonstrating that (1) alternate means exist to accomplish the same result without the adverse disproportionate impact on the protected group, and (2) the defendant refuses to adopt this alternate means. [*See Esposito v. Township of Edison*, 306 N.J. Super. 280, 290, 703 A.2d 674, 679 (App. Div. 1997), *certif. denied*, 156 N.J. 384, 718 A.2d 1212 (1998)].

Consider: Statistics are generally necessary in a disparate impact case. The data must show a statistically significant disparity. [*See Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 645–658 (1989) (as amended by Civil Rights Act of 1991)].

Counseling Point: In a disparate impact case it is always advisable to retain a statistical expert early on who will aid in the interpretation, utilization, and presentation of the data throughout the litigation.

12.09 Affirmative Defenses.

12.09[1] Bona Fide Occupational Qualification (“BFOQ”). The LAD provides an exception to its general prohibition of intentional discrimination where the protected characteristic is a BFOQ. [*See N.J. Stat. Ann. § 10:5-2.1*]. Although this defense can apply to allegations of discrimination on the basis of any protected characteristic, it is most commonly applied to sex discrimination claims. If a defendant can demonstrate that requiring employees to be of a certain gender is reasonably necessary to the normal operation of its business, a discriminatory refusal to hire, based on an individual's sex, will not be actionable. It has been noted that utilization of this defense generally takes two forms: either an employer perceives that employees of a particular sex are unable to physically perform the job, or that the employer's customers prefer a particular sex. [*See Spragg v. Shore Care*, 293 N.J. Super. 33, 50, 679 A.2d 685, 693 (App. Div. 1996)].

Strategic Point—Defendant: The defendant has the burden of persuasion to demonstrate that the business operation, at its core, necessitates employing individuals of only one sex. Additionally, while privacy concerns of customers may sometimes be implicated (e.g., patients may have a legitimate basis for requesting that only personnel of the same gender be present during certain examinations or procedures), when the BFOQ defense is based upon

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customer preferences, the defendant must demonstrate that there is no non-discriminatory alternative, such as job reassignment, because of the nature of the defendant's business. [*See Spragg v. Shore Care*, 293 N.J. Super. 33, 52, 679 A.2d 685, 694 (App. Div. 1996)].

12.09[2] The After-Acquired Evidence Doctrine. The after-acquired evidence doctrine operates as a defense in wrongful discharge cases whereby proof of an employee's prior improper actions in connection with the employment (e.g., resume fraud or theft of company property) discovered subsequent to the employee's termination may limit the employer's liability for economic damages going forward from the date of the discovery of the employee's misconduct. [*See Nicosia v. Wakefern Food Corp.*, 136 N.J. 401, 417, 643 A.2d 554, 562 (1994)]. The doctrine's rationale is that had the employer known of the employee's wrongdoing at the time, the employee either would not have been hired or would have been fired prior to the discriminatory act and thus, the employee is not entitled to relief. [*See Nicosia v. Wakefern Food Corp.*, 136 N.J. 401, 418, 643 A.2d 554, 562 (1994)].

Consider: The only context in which the New Jersey Supreme Court has permitted the use of this defense is where a convicted felon who was statutorily disqualified from holding his position in public employment nonetheless sought damages under the LAD for allegedly being wrongfully discharged from that position. While the Court held that the plaintiff was precluded from seeking economic damages for his lost wages because New Jersey's public-office forfeiture statute precluded convicted felons from holding the type of public position the plaintiff held, and therefore the plaintiff never should have been hired for the position anyway, the Court noted that the after-acquired evidence defense would not preclude a plaintiff from seeking non-economic damages (e.g., damages for emotional distress) that occurred as a result of discrimination, even in a public-office forfeiture case. More important, the Court declined to decide whether the after-acquired evidence defense would apply to cases that do not involve the public-office forfeiture statute. [*See Cedeno v. Montclair State Univ.*, 163 N.J. 473, 479, 750 A.2d 73, 75 (2000); *see also Taylor v. Intl. Maytex Tank Terminal Corp.*, 355 N.J. Super. 482, 810 A.2d 1109 (App. Div. 2002)].

Strategic Point — Defendant: While there is some very strong language in New Jersey case law suggesting that the after-acquired evidence doctrine is antithetical to the purposes of the LAD, there is no definitive word on the appropriateness of such an application. [*See Nicosia v. Wakefern Food Corp.*, 136 N.J. 401, 418–419, 643 A.2d 554, 562–563 (1994)]. Therefore, the defense may still be asserted.

In order to utilize this defense, the employer must clearly establish that the wrongdoing in question was of such a magnitude that if the employer had known

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of it at the time of the plaintiff's discharge, the plaintiff would have been fired on that ground alone. [*See* *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362–63 (1995)].

Strategic Point — Plaintiff: Plaintiff's counsel should attempt to limit the use of after-acquired evidence at trial if the court is going to permit the defendant to assert the defense. Because after-acquired evidence is not relevant in the liability stage of the litigation, but rather only impacts on the measure of damages once liability is found, counsel should request bifurcation of the liability and damages phases of trial. [*See* *U.S. v. Garden Homes Mgmt., Corp.*, 2001 U.S. Dist. LEXIS No. 12934 at *6 (D.N.J. July 30, 2001), *vacated in part and remanded in part*, 104 Fed. Appx. 796 (2004)]. Arguments of confusion of the issues and undue prejudice should be forcefully pursued.

12.09[3] Statute of Limitations.

● **Timing:** If a plaintiff chooses to proceed in the New Jersey Division on Civil Rights ("DCR"), a verified complaint must be filed with the DCR within 180 days of the adverse employment action. [*See* N.J. Stat. Ann. § 10:5-18; N.J. Stat. Ann. § 10:5-13].

◆ **Cross-Reference:** Discussion, see Ch 9 *above*.

If the plaintiff chooses to file a civil lawsuit in New Jersey Superior Court or United States District Court, a two-year statute of limitations period applies. [*See* *Montells v. Haynes*, 133 N.J. 282, 298, 627 A.2d 654, 662 (1993)]. However, it is important to note that (1) the plaintiff need not file in the DCR to proceed with a lawsuit; (2) a plaintiff cannot proceed with a lawsuit after receiving a finding of no probable cause from the DCR; and (3) greater remedies are available to plaintiffs proceeding in court than are available at the DCR. [*See* 12.11 *below*].

◆ **Cross-Reference:** Discussion, see Ch 9, *above*.

Strategic Point — Plaintiff: When the circumstances warrant the use of the continuing violation doctrine, an equitable exception to the statute of limitations period, otherwise time-barred claims may be saved. [*See* *Hall v. St. Joseph's Hospital*, 343 N.J. Super. 88, 100, 777 A.2d 1002, 1010 (App. Div. 2001), *certif. denied*, 171 N.J. 336, 793 A.2d 715 (2002)].

● **Warning:** The application of the continuing violation doctrine is limited to certain types of cases. When the complained-of conduct takes the form of discrete acts of discrimination, the continuing violation doctrine is unavailable. Discrete acts of discrimination, such as a failure to hire, a failure to promote, a demotion, or a discharge, are considered to provide a plaintiff sufficient notice of an LAD violation, and therefore, a separate limitations period begins to run from each such discriminatory act. [*See* *Shepherd v. Hunterdon Develop. Ctr.*, 174 N.J. 1, 21, 803 A.2d 611, 623 (2002)]. Hostile

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work environment claims, on the other hand, consist of repeated harassing acts over a period of time that collectively constitute a single unlawful employment practice under the LAD. [*See* *Shepherd v. Hunterdon Develop. Ctr.*, 174 N.J. 1, 21, 803 A.2d 611, 623 (2002)]. These latter claims are the type of claims to which the continuing violation doctrine is most appropriately applied. As long as one harassing act took place within the limitations period, all other acts of harassment that form a part of the discriminatory practice will be actionable against the employer as well, even if some of them occurred outside the limitations period. [*See* *Shepherd v. Hunterdon Develop. Ctr.*, 174 N.J. 1, 20, 803 A.2d 611, 622–623 (2002)].

Strategic Point — Plaintiff: In deciding the proper scope of the continuing violation doctrine, the New Jersey Supreme Court adopted the United States Supreme Court’s reasoning in an earlier decision examining this issue. In that decision, the United States Supreme Court held that plaintiffs need not establish a continuing violation to bring claims regarding otherwise time-barred conduct if a pattern and practice of discrimination is alleged. [*See* *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 n.9 (2002)]. This exception permits plaintiffs to bring claims based on otherwise time-barred *discrete acts* if those discrete acts can fairly be characterized as part of an overall pattern or practice of discrimination.

12.09[4] Failure to Mitigate Economic Damages. Although it is the plaintiff’s duty to take reasonable measures to minimize the economic damages that result from discrimination, because a plaintiff’s failure to mitigate economic damages is an affirmative defense, the defendant has the burden of persuasion to demonstrate that the plaintiff could have obtained comparable employment but did not do so. As a corollary to this defense, the defendant can use the “lowered sights” doctrine to argue that after a reasonable amount of time had passed without the plaintiff finding comparable employment, the plaintiff should have lowered his or her sights and accepted less than comparable employment. [*See* *Goodman v. London Metals Exch., Inc.*, 86 N.J. 19, 40–41, 429 A.2d 341, 352 (1981)].

Strategic Point: The lowered sights doctrine is often a lose/lose proposition for plaintiffs and a win/win proposition for defendants. On the one hand, if the plaintiff does not lower his or her sights early enough, the income that could have been earned from less than comparable employment will be attributed to the plaintiff and accordingly deducted from the economic damages award. On the other hand, if the plaintiff lowers his or her sights too early, the additional income that could have been earned from comparable employment (as opposed to the less than comparable employment that the plaintiff prematurely accepted) will be attributed to the plaintiff and accordingly deducted from the economic damages award. [*See* *Goodman v. London Metals Exch., Inc.*, 86 N.J. 19, 40 n.3, 429 A.2d 341, 352 (1981)].

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12.10[1] Back Pay. Back pay is the difference between what the plaintiff would have earned in the absence of discrimination and what the plaintiff actually earned as a result of the discrimination, calculated to the date of judgment. An award of back pay is an equitable remedy, designed to put the plaintiff in the position he/she would have been, but for the discriminatory act. [*See* Goodman v. London Metals Exch., Inc., 86 N.J. 19, 34–35, 429 A.2d 341, 349 (1981)]. Back pay includes lost compensation and other benefits of employment, such as payments to retirement programs and losses resulting from the termination of health insurance policies. [*See* Weiss v. Parker Hannifan Corp., 747 F. Supp. 1118, 1126–1133 (D.N.J. 1990)]. Any monies earned by the plaintiff in mitigation will be deducted from the back pay award. [*See* Goodman v. London Metals Exch., Inc., 86 N.J. 19, 35, 429 A.2d 341, 349 (1981)].

▶**Cross-Reference:** Discussion, see 12.09[4] *above* (mitigation of economic damages).

Strategic Point — Defendant: An unconditional offer of reinstatement to a discharged employee will act to cut off back pay from the date of the offer forward. [*See* Ford Motor Co. v. EEOC, 458 U.S. 219 (1982), *superseded by statute as stated in* McCoy v. Oscar Mayer Foods, 1997 U.S. App. LEXIS 4635 (7th Cir. Ill. March 6, 1997)].

12.10[2] Front Pay. When reinstatement is not warranted due to animosity between the parties, front pay may be awarded for a period of time into the future (i.e., past the date of judgment). A front pay award is designed to compensate the plaintiff for future lost wages attributable to the defendant's misconduct. The award should be based on a reasonable finding of how long it will take the plaintiff to regain the economic position he or she enjoyed prior to the discriminatory act. [*See* Weiss v. Parker Hannifan Corp., 747 F. Supp. 1118, 1135 (D.N.J. 1990)]. Of course, if the plaintiff's mitigation earnings already equal or exceed his or her lost earnings from the defendant employer, front pay should not be awarded.

12.10[3] Emotional Distress Damages. The LAD specifically authorizes the recovery of damages for emotional distress and pain and suffering. [*See* N.J. Stat. Ann. § 10:5-3]. A jury award for such damages must remain undisturbed unless the award is so disproportionate to the harm suffered that it “shocks the conscience,” resulting in manifest injustice. [*See* Rendine v. Pantzer, 141 N.J. 292, 312, 661 A.2d 1202, 1214 (1994)].

Strategic Point — Defendant: Because all damages must be proximately caused by the unlawful discrimination, the defendant can limit an award of emotional distress damages by pointing to alternate sources of such

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damages in a particular plaintiff's past. [*See Reynolds v. Atlantic City Convention Ctr. Auth.*, No. 88-4232, 1990 U.S. Dist. LEXIS 17016, at 75 (D.N.J. May 21, 1990), *aff'd*, 925 F.2d 419 (3d Cir. 1991)]. A defendant must always explore the possibility of securing an expert regarding emotional distress damages. Securing the plaintiff's healthcare records may often provide an insight as to whether an expert opinion is advisable.

Strategic Point — Plaintiff: An award of emotional damages does not require expert testimony or objective corroboration. [*See Rendine v. Pantzer*, 141 N.J. 292, 312, 661 A.2d 1202, 1214 (1995)]. Indeed, the New Jersey Supreme Court has held that a plaintiff's burden of proof on a claim for emotional distress under the LAD is much less onerous than that on a claim of intentional infliction of emotional distress. [*Tarr v. Bob Ciasulli's Mack Auto Mall, Inc.*, 181 N.J. 70, 853 A.2d 921, (2004)]. However, the foregoing notwithstanding, objective corroboration such as expert testimony or a course of treatment will certainly bolster a plaintiff's claim. That being the case, where treatment has been sought, the results and conclusions arising from such treatment should be fully examined and utilized in litigation.

◆ **Cross-Reference:** Discussion, see 6.12 *above* (regarding *Tarr* holding).

12.10[4] Punitive Damages. While the LAD provides for punitive damages, such damages will not be awarded in every LAD case. As a preliminary matter, although the damages cap imposed by New Jersey's Punitive Damages Act ("PDA") does not apply to LAD cases, the rest of the PDA's requirements do apply to LAD cases, including the requirement that punitive damages be proven by clear and convincing evidence. [*See N.J. Stat. Ann. § 2A:15-5.9 to 5.17*]. Thus, punitive damages will not be routinely awarded or upheld. Moreover, there are two distinct requirements that must be satisfied before a punitive damage award will be sanctioned. First, there must be proof of actual participation in, or willful indifference to, the discriminatory conduct on the part of upper management. Second, there must be proof of especially egregious conduct. [*See Rendine v. Pantzer*, 141 N.J. 292, 313, 661 A.2d 1202, 1215 (1995)]. Proof of especially egregious conduct requires a showing of actual malice.

Example: Punitive damages should not be awarded unless it is demonstrated that the defendant authorized or directed the discriminatory acts of its employees or at least agreed and acquiesced with the discriminatory conduct. [*See Rendine v. Pantzer*, 141 N.J. 292, 315, 661 A.2d 1202, 1216 (1995)].

Consider: Upper management is not limited to the uppermost managerial positions. [*See Cavuoti v. New Jersey Transit Corp.*, 161 N.J. 107, 122, 735 A.2d 548, 557 (1999)]. Rather, upper management consists of those individuals who are responsible for formulating, implementing and ensuring a company's compliance with anti-discrimination policies. Moreover, to be

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upper management for purposes of a punitive damage award, a second level manager must have either (1) broad supervisory powers over the employees at issue or (2) delegated authority to implement and ensure compliance with a company's anti-discrimination policies. [*See Cavuoti v. New Jersey Transit Corp.*, 161 N.J. 107, 128–129, 735 A.2d 548, 561 (1999)].

Example: Actual malice will be found upon proof of an “evil-minded act” or “an act accompanied by a wanton and willful disregard for the rights of another.” [*See Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 49–50 (1984)]. Additionally, the New Jersey Model Jury Charge on punitive damages in employment law cases requires that in determining whether a defendant's conduct is “especially egregious,” a jury must consider all of the evidence surrounding the wrongful conduct, including the following:

- (1) The likelihood that serious harm would arise from the discrimination;
- (2) Individual discriminator's awareness or reckless disregard of the likelihood that serious harm would arise;
- (3) Individual discriminator's conduct after learning that his/her conduct would likely cause harm; and
- (4) The duration of the wrongful conduct and any concealment of that conduct by individual discriminator. [*See New Jersey Model Jury Charge 6.20B*].

A finding of negligence or gross negligence will not support an award for punitive damages. [*See New Jersey Model Jury Charge 6.20B*].

● **Warning:** Punitive damage awards are subject to appellate reversal if they are so excessive as to violate substantive due process. [*See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–586 (1999)]. Three factors are evaluated when making this determination:

- (1) the degree of reprehensibility of the conduct that formed the basis of the civil suit;
- (2) the disparity between the harm or potential harm suffered by the plaintiff and the plaintiff's punitive damages award; and
- (3) the difference between this remedy and other penalties authorized or imposed in comparable cases of misconduct. [*See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1999); *Lockley v. State of New Jersey*, 177 N.J. 413, 428–29, 828 A.2d 869, 879–80 (2003); *Baker v. National State Bank*, 353 N.J. Super. 145, 801 A.2d 1158 (App. Div. 2002)].

As for the reprehensibility factor, the Court noted that (1) nonviolent crimes are not as serious as violent ones, (2) offenses involving “trickery and deceit” are more reprehensible, and (3) repeated unlawful conduct justifies a more

12.10[5]**Discrimination**

serious punishment. Finally, it was noted that even solely economic injury could justify a substantial penalty if it resulted from intentional and affirmative misconduct or the victim was financially vulnerable. [*See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576–577 (1999)].

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the Court held that “[s]ingle-digit multipliers are more likely to comport with due process,” meaning that a punitive damage award that is equal to or less than nine times the compensatory damage award is more likely to be upheld. [*State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003)]. However, the Court noted that “because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’ ” [*State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003) (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584 (1999))].

Strategic Point — Defendant: Even if all of the factors listed above are present, it can still be argued that remittitur is appropriate because there is a “less drastic remedy” that would sufficiently punish and deter the defendant. [*See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584 (1999)].

The reality of punitive damage awards is that they are extremely fact-specific and will vary depending on the conduct and financial condition of the defendant in a given case. [*See Baker v. Nat’l State Bank*, 353 N.J. Super. 145, 165, 801 A.2d 1158, 1170 (App. Div. 2002)]. For this reason, punitive damage awards are always vulnerable on appeal.

12.10[5] Attorneys’ Fees and Costs of Litigation. A prevailing plaintiff is entitled to recover reasonable costs and attorneys’ fees under the LAD, including a multiplier or enhancement if the case was taken on a contingent-fee basis. [*See Rendine v. Pantzer*, 141 N.J. 292, 661 A.2d 1202 (1995)]. However, a prevailing defendant is not entitled to such an award unless the case was brought in bad faith. [*See N.J. Stat. Ann. § 10:5-27*].

Consider: A prevailing plaintiff is one who has succeeded in “any significant issue in litigation which achieved some of the benefit the party sought in bringing the suit.” [*See Blakey v. Continental Airlines*, 2 F. Supp.2d 598, 602 (D.N.J. 1998)].

Consider: The LAD does not require any proportionality between the damages recovered and the counsel fees awarded. [*See Szczepanski v. Newcomb Med. Ctr., Inc.*, 141 N.J. 346, 366, 661 A.2d 1232, 1243 (1995)].

The calculation of a fee award begins with the lodestar amount, which is the number of hours reasonably expended, multiplied by a reasonable hourly rate. [*See Rendine v. Pantzer*, 141 N.J. 292, 334–335, 661 A.2d 1202, 1226 (1995)].

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The reasonableness of the hourly rates is determined by assessing the skill and experience of the attorneys and comparing the rates to rates in the community for similar services by lawyers of reasonably comparable skill, expertise and reputation. [*See Rendine v. Pantzer*, 141 N.J. 292, 337, 661 A.2d 1202, 1227 (1995)].

Strategic Point — Plaintiff: To take into account delay in payment, the hourly rate at which compensation is to be awarded should be based on current rates, rather than those in effect when the services were performed. [*See Rendine v. Pantzer*, 141 N.J. 292, 337, 661 A.2d 1202, 1227 (1995)].

Strategic Point — Defendant: In the event a plaintiff is only partially successful in the litigation, it is proper to request a reduction of the lodestar fee. [*See Rendine v. Pantzer*, 141 N.J. 292, 336, 661 A.2d 1202, 1227 (1995)]. However, plaintiff can counter that fees should not be deducted in instances when certain claims are dismissed if those claims arise from a common factual core. [*See Singer v. State of New Jersey*, 95 N.J. 487, 499–500, 472 A.2d 138, 144, *certif. denied*, 469 U.S. 832 (1984)].

Strategic Point — Plaintiff: In the event a defendant challenges either the time spent by counsel or the hourly rates charged, or both, a plaintiff may seek discovery as to the time spent by defendant's counsel and the hourly rates of the defense attorneys who worked on the case. [*See In re First Peoples Bank Shareholders Litigation*, 121 F.R.D. 219 (D.N.J. 1988)]. Such a comparison is not conclusive; however, it may provide a "floor" from which to assess the reasonableness of plaintiff's counsel's fees.

Once the lodestar is calculated, the trial court must determine whether an increase in this figure is warranted due to the risk of non-payment in contingent fee matters. Such an enhancement should typically range between five and 50 percent of the lodestar award. [*See Rendine v. Pantzer*, 141 N.J. 292, 343, 661 A.2d 1202, 1231 (1995)]. Factors taken into consideration during this enhancement determination are as follows:

- (1) whether the case was taken on a contingency basis;
- (2) whether the attorney was able to mitigate the risk of non-payment in any way;
- (3) whether any other economic risks were aggravated by the contingency of payment; and
- (4) the strength of the plaintiff's case. [*See Rendine v. Pantzer*, 141 N.J. 292, 339, 661 A.2d 1202, 1229 (1995)].

Strategic Point — Plaintiff: Fees and costs incurred in attempting to satisfy and collect on the judgment are also recoverable under fee-shifting statutes in New Jersey. [*See Tanksley v. Cook*, 360 N.J. Super. 63, 821 A.2d 524 (App. Div. 2003)].

12.10[6]**Discrimination**

12.10[6] Pre- and Post-Judgment Interest. Pre-judgment interest is a mandatory element of a compensatory damage award in LAD actions to ensure that the plaintiff is made whole. [See New Jersey Court Rule 4:42-11(b); *Baker v. Nat’l State Bank*, 353 N.J. Super. 145, 159, 801 A.2d 1158, 1168 (App. Div. 2002)]. The New Jersey Court Rules also provide for post-judgment interest, running from the date of judgment unless otherwise directed by the trial court in its discretion. [See New Jersey Court Rule 4:42-11(a)]. While pre-judgment interest is awarded as a matter of course, a trial court has discretion in “determining whether to stay an award of post-judgment interest.” [See *Baker v. Nat’l State Bank*, 353 N.J. Super. 145, 176–177, 801 A.2d 1158, 1177 (App. Div. 2002)].

12.11 Venue.

The LAD provides a plaintiff with a choice of venue when seeking to redress unlawful discrimination. Claims may be pursued either administratively, by filing a verified complaint with the DCR, or judicially, by instituting suit in New Jersey Superior Court (or, in cases of diversity jurisdiction, United States District Court). [See N.J. Stat. Ann. § 10:5-13]. The remedial powers of the Director of the DCR are similar to those accorded a trial court. [See *Shaner v. Horizon Bancorp.*, 116 N.J. 433, 440, 561 A.2d 1130, 1134 (1989), *superseded by statute as stated in*, *Montells v. Haynes*, 133 N.J. 282, 627 A.2d 654, 1993 N.J. LEXIS 732, 65 Fair Empl. Prac. Cas. (BNA) 1269 (1993) and *Abbamont v. Piscataway Township Bd. of Educ.*, 269 N.J. Super. 11, 634 A.2d 538, 1993 N.J. Super. LEXIS 853, 10 I.E.R. Cas. (BNA) 192 (App. Div. 1993)]. A determination by the DCR is a “final order” and is, just like a final judgment in Superior Court, appealable to the Appellate Division. [See N.J. Stat. Ann. § 10:5-21].

Strategic Point—Plaintiff: As a general rule, plaintiffs should bring their claims in the Superior Court of New Jersey, rather than the DCR or the United States District Court for the District of New Jersey. It is important to note that (1) the plaintiff need not file in the DCR to proceed with a lawsuit; (2) a finding of no probable cause by the DCR bars a plaintiff from proceeding in court; and (3) uncapped non-economic damages and punitive damages are only available in a court proceeding. In light of the foregoing, the DCR should be utilized only if the plaintiff’s damages are very limited (particularly the non-economic damages, which are capped in the DCR anyway), but the proofs of liability are strong. In such situations, the DCR’s limited investigatory resources will not hinder the agency’s ability to make a probable cause determination (because the proofs of liability are clear) and the damages restriction will not prejudice the plaintiff (because the potential damages are small).

Strategic Point—Plaintiff: Plaintiffs should also avoid federal court in most circumstances. First, discovery is more limited in federal court. For

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example, parties are limited to 25 interrogatories and 10 depositions without leave of court, and the time provided for discovery in the United States District Court for the District of New Jersey is generally shorter than the 450 days provided for LAD cases in the Superior Court of New Jersey. [*See* Federal Rules of Civil Procedure 30(a)(2)(A) and 33(a)]. Second, federal judges tend to rely on federal case law when deciding issues that are unresolved under state law, and most federal cases take a much more restrictive view of employees' rights than the New Jersey state courts historically have. Third, the federal pretrial order requirement as interpreted and applied in New Jersey imposes an additional layer of litigation that is both burdensome and prejudicial to plaintiffs. Because the District of New Jersey essentially requires the parties to try their case on paper in the pretrial order and strictly enforces the rule that evidence that has not been identified in the pretrial order (including specific elements of witness testimony) will not be admitted at trial, discrimination plaintiffs are often stripped of the flexibility needed to try their cases effectively.

Strategic Point—Plaintiff: To avoid removal to federal court, the plaintiff must avoid bringing any federal claims and ensure that there is not diversity of citizenship among the parties. [*See* 28 USCS § 1441(b)]. To avoid diversity, the plaintiff need only name a local defendant, regardless of whether the plaintiff is a New Jersey resident or not. [*See* 28 USCS § 1441(b)].

A corporation is considered a resident of both the state in which it is incorporated and the state in which its principal place of business is located. [*See* 28 USCS § 1332(c)(1)]. Thus, a corporate defendant cannot remove a case to federal court in either such state. If New Jersey is neither the corporate defendant's state of incorporation nor the site of the corporate defendant's principal place of business, plaintiff's counsel should name an individual defendant who is a resident of New Jersey to defeat diversity.

Caution: With regard to federal claims, it is generally both unnecessary and undesirable for New Jersey discrimination plaintiffs to bring claims under Title VII of the Civil Rights Act of 1964. First, the LAD provides plaintiffs with greater remedies than Title VII. Unlike the LAD, which provides plaintiffs with uncapped compensatory and punitive damages, Title VII caps the sum of plaintiff's non-economic compensatory damages and any punitive damages based on the number of employees that the defendant has, with the highest cap being \$300,000. [*See* 42 USCS § 1981a; *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (holding that front pay is not limited by compensatory damages cap)]. In addition, LAD attorney's fee awards may be enhanced with a multiplier in contingent fee cases, while such enhancement is not available under Title VII. [*See* *Rendine v. Pantzer*, 141 N.J. 292, 661 A.2d 1202 (1995) (permitting contingent-fee

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Discrimination

enhancement of attorney's fee awards under LAD); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (refusing to permit contingent-fee enhancement of attorney's fee awards under federal fee-shifting statutes)]. Second, the scope of prohibited conduct is more limited under Title VII than under the LAD. While the LAD prohibits discrimination on the basis of marital status, sexual orientation, genetic traits, and domestic partnership status, Title VII does not. Third, the LAD protects more persons from discrimination than Title VII. The LAD prohibits discrimination against independent contractors, while Title VII does not. Fourth, the LAD regulates more parties than Title VII. Under Title VII, only employers with 15 or more employees are covered and individuals cannot be held liable; under the LAD, all employers are covered regardless of the number of employees and individuals can be held liable.

Consider: In light of the foregoing, there are only three limited circumstances under which a New Jersey discrimination plaintiff should use Title VII. First, reverse discrimination plaintiffs may want to avail themselves of the more lenient prima facie case under Title VII. Second, plaintiffs who have signed enforceable arbitration agreements may want to see if the EEOC will pursue their case in court for them, because the EEOC is not bound by such arbitration agreements. [*See EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)]. Third, claims against municipal or county employers may be more advantageously pursued in federal court than in the county in which the claims arose.

Forms

12.12

C. FORMS

12.12 FORM: Sample Intake Questionnaire

LAW FIRM NAME
EMPLOYMENT LAW DEPARTMENT
INTAKE QUESTIONNAIRE

Please complete this questionnaire to the best of your ability and include any information you feel is necessary for our firm to evaluate your potential employment claim. The final pages of the questionnaire contain blank space in which you can write additional information or make a timeline of events about which you want us to know. Should you require additional space, feel free to attach your own written summary. If you have any relevant documents you feel might be helpful for our review (employee handbooks/employee manuals, performance evaluations, termination letters, etc.), please attach *photocopies* of these documents. PLEASE DO NOT SEND ANY ORIGINAL DOCUMENTS

Name: _____ Today's Date: _____

Address: _____

Telephone (Home) _____ (Work) _____

How did you hear about our firm? _____

There are several groups that are protected by New Jersey's Law Against Discrimination. Are you a member of any of the following groups?

Are you a minority? _____ Race/Color/National Origin/Ancestry

Are you over the age of 40? _____ Age _____

Do you have a disability? _____ What is it? _____

Were you discriminated against because of your race, age or disability? _____

Were you discriminated against due to your sex? _____ M
_____ F _____

Were you sexually harassed? _____

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Discrimination

Were you discriminated against due to any of the following: sexual orientation, religion, marital status, domestic partnership status, genetic information, liability for service in the armed forces, or nationality?
Yes _____ No _____

If so, which? _____

Did you report that your employer was engaged in illegal activity or complain to your employer about unlawful activity occurring in the workplace? _____

If yes, explain _____

Company Information

Employer: _____

Did you work in a NJ office? _____

Address of Employer: _____

Date of Hire: _____

Are you still employed there? _____ If no, Last Date of Employment _____

If no longer there, were you fired? _____ Reason Given by Employer: _____ What do you think the reason is? _____

If still there, what was the action taken against you?

Position held: _____ Salary: _____

How many employees does the company have: a) total _____ b) in your location _____ c) in your department _____

How many of the employees in your department are minorities? _____

How many of the employees in your department are female? _____

How many of the employees in your department are over 40 years old? _____

How many employees had the same position as you? _____

Employment Situation At Company

Indicate if any of the following are provided by the employer:

Forms**12.12**

Health insurance _____ If yes,
what is covered? _____ At what cost to you? _____

Does the employer contribute? _____ How much? _____

Life insurance _____ If yes, how much? _____

Pension plan contributions _____ If yes, how much? _____
Vested? _____

Does the employer contribute? _____ How much? _____

Disability insurance _____ What is offered? _____

401(k) _____ If yes, how much? _____ Does the employer contribute? _____ How much? _____ When terminated, was the plan rolled over? _____ Was any money withdrawn? _____ If yes, was there a penalty? _____

Profit Sharing _____ Stock Options _____

Other benefits: _____
(i.e., company car, day care, etc.)

Did you have any type of employment contract with the company?

Were you a union employee? _____ What union?: _____

Name and number of union contact: _____

Did you receive performance evaluations? _____ Years _____

Written or oral? _____ If written, did you sign them? _____

Do you have copies? _____ Were any of the evaluations negative?

Explain: _____

What rating did you receive? _____

Did you receive promotions? _____ Salary increases? _____

Awards? _____ Commendations? _____ Bonuses? _____

Were you ever disciplined? _____ If so, For what? _____

What punishment did you receive? _____

Did employer discipline other employees who did the same thing? _____

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Discrimination

Employee Complaints

Does the company have a policy manual or handbook? _____ Does the manual have a complaint procedure? _____ Do you have a copy? _____

Did you complain? _____ To whom? _____

How many times? _____ Dates of complaints: _____

Were the complaints made in writing? _____ If so, do you have copies? _____

Were the complaints verbal? _____ If so, what was said? _____

What has company done with complaint? _____

Have you filed a charge with the Equal Employment Opportunities Commission (EEOC) or the Division on Civil Rights (DCR)? _____

When? _____ What is status? _____

Investigation

Was there an investigation? _____ Who investigated? _____

Were you interviewed? _____ Do you know who was interviewed? _____

Did you submit anything in writing for the investigation? _____ What were the results of the investigation? _____ Were you given the results in writing? _____

Economic Damages

Does employer owe you money? _____ How much? _____

Did you receive severance? _____

Did you sign anything? _____ What? _____

If the employer has given you a release, how much time do you have to sign it? _____

Are you receiving unemployment? _____ Amount: _____ Dates _____

Are you receiving any government benefits? (Welfare, SS)? _____ Amount: _____ Dates _____

List all employment since termination _____

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Discrimination

12.13 FORM: Sample Complaint

LAW FIRM NAME

ADDRESS

PHONE

Attorneys for Plaintiff

SUPERIOR COURT OF NEW
JERSEY
LAW DIVISION
_____ COUNTY
DOCKET NO. _____

v.

Plaintiff,
Defendants.

Civil Action

**COMPLAINT AND
JURY DEMAND**

Plaintiff _____, by way of Complaint against defendants, says:

THE PARTIES

1. Plaintiff _____ (“plaintiff”) currently resides at _____, Township of _____, County of _____, State of New Jersey. At all times relevant to this Complaint, plaintiff was employed by defendant _____ as a _____ in the Township of _____, County of _____, State of New Jersey.

2. Defendant _____ (“_____”) is incorporated in the State of _____, and maintains its principal place of business at _____, County of _____, State of New Jersey. Defendant _____ does business in the County of _____, State of New Jersey.

3. Defendant _____ (“_____”) was a _____ for defendant _____ at all times relevant to this Complaint. In that capacity,

Forms**12.13**

defendant _____ had supervisory authority over plaintiff. Defendant _____ currently resides at _____, Township of _____, County of _____, State of New Jersey.

FACTS COMMON TO ALL COUNTS

4. [Plead sufficient factual allegations to state a course of action and put defendants on notice as to why they are being sued.]

FIRST COUNT**DISCRIMINATION IN VIOLATION OF
THE NEW JERSEY LAW AGAINST DISCRIMINATION**

5. Plaintiff repeats and realleges all of the foregoing allegations as if set forth at length herein.

6. By and through the conduct described above, defendants discriminated against plaintiff on the basis of his/her _____ in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

7. As a result of defendants' unlawful conduct, plaintiff has suffered and continues to suffer economic losses, harm to career, harm to reputation, bodily injury with physical manifestations, physical pain and suffering, severe emotional distress, and other such damages compensable under the New Jersey Law Against Discrimination.

WHEREFORE, plaintiff demands judgment against defendants for the following:

- a. Compensatory damages;
- b. Consequential damages;
- c. Punitive damages;
- d. Attorney's fees with enhancement under Rendine v. Pantzer;
- e. Costs of suit;
- f. Interest; and
- g. Such other and further relief as the Court may deem equitable and just.

SECOND COUNT**INDIVIDUAL LIABILITY UNDER THE
NEW JERSEY LAW AGAINST DISCRIMINATION**

8. Plaintiff repeats and realleges all of the foregoing allegations as if set forth at length herein.

9. Defendants aided and abetted one another in violating the New Jersey Law Against Discrimination.

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Discrimination

10. Defendant _____ interfered with plaintiff’s exercise and enjoyment of his/her rights under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

11. Defendant _____ is therefore individually liable to plaintiff for his/her violation of the New Jersey Law Against Discrimination.

12. As a result of defendants’ unlawful conduct, plaintiff has suffered economic losses, harm to career, harm to reputation, bodily injury with physical manifestations, physical pain and suffering, severe emotional distress, and other such damages compensable under the New Jersey Law Against Discrimination.

WHEREFORE, plaintiff demands judgment against defendants for the following:

- a. Compensatory damages;
- b. Consequential damages;
- c. Punitive damages;
- d. Attorney’s fees with enhancement under Rendine v. Pantzer;
- e. Costs of suit;
- f. Interest; and
- g. Such other and further relief as the Court may deem equitable and just.

LAW FIRM
Attorneys for Plaintiff

BY:_____
ATTORNEY NAME

Dated: _____

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues so triable.

LAW FIRM
Attorneys for Plaintiff

BY:_____
ATTORNEY NAME

Forms

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Dated: _____

DESIGNATION OF TRIAL COUNSEL

Plaintiff hereby designates _____ as his trial counsel in the above-captioned matter.

LAW FIRM
Attorneys for Plaintiff

BY: _____
ATTORNEY NAME

Dated: _____

CERTIFICATION

I hereby certify that, to the best of my knowledge, this matter is not the subject of any other action or other proceeding and that no other action or other proceeding is contemplated at this time. I further certify that, to the best of my knowledge, there are no other parties who should be joined in this action at this time.

LAW FIRM
Attorneys for Plaintiff

BY: _____
ATTORNEY NAME

Dated: _____

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Discrimination

12.14 FORM: Sample Answer

LAW FIRM NAME

ADDRESS

PHONE

Attorneys for Defendants

SUPERIOR COURT OF NEW
JERSEY
LAW DIVISION
_____ COUNTY
DOCKET NO. _____

_____,
v. _____,

Plaintiff,
Defendants.

Civil Action
ANSWER TO COMPLAINT;
AFFIRMATIVE DEFENSES; JURY
DEMAND; DESIGNATION OF
TRIAL COUNSEL;
CERTIFICATION PURSUANT
TO R. 4:5-1; DEMANDS
PURSUANT TO R. 4:5-2 AND R.
4:18-2; CERTIFICATION OF
SERVICE

Defendants _____, _____, and _____ (collectively referred to as "defendants") hereby answer plaintiff's Complaint as follows:

1. Defendants admit the allegations contained in Paragraph 1 of the Complaint.
2. Defendants deny the allegations contained in Paragraph 2 of the Complaint.
3. Defendants lack knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint, and leave plaintiff to her proofs.

Forms**12.14****COUNT ONE**

4. Defendants incorporate each and every prior answer as if those answers were fully restated herein.

5. Defendants deny the allegations contained in Paragraph 5 of the Complaint.

6. Wherefore, defendants demand judgment dismissing Count One of the Complaint with prejudice, awarding them attorneys' fees and costs, and granting them such other relief as the Court may deem equitable and just.

AFFIRMATIVE DEFENSES**FIRST AFFIRMATIVE DEFENSE**

The Complaint fails to state any claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Defendants did not proximately cause any harm to plaintiff.

THIRD AFFIRMATIVE DEFENSE

Any harm that plaintiff suffered was caused by her own conduct.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of estoppel.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the New Jersey worker's compensation statute.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of laches.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the applicable statutes of limitation.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of waiver.

NINTH AFFIRMATIVE DEFENSE

Plaintiff failed to mitigate her damages.

12.14**Discrimination****TENTH AFFIRMATIVE DEFENSE**

Plaintiff's employment would have terminated regardless of his/her _____ [*insert alleged protected characteristic*].

WHEREFORE, defendants demand judgment dismissing plaintiff's Complaint in its entirety with prejudice, awarding them attorneys' fees and costs, and granting them such other relief as the Court may deem equitable and just.

JURY DEMAND

Defendants demand trial by jury as to all issues so triable.

DESIGNATION OF TRIAL COUNSEL

Defendants hereby designate _____ as their trial counsel in this matter.

CERTIFICATION PURSUANT TO RULE 4:5-1

I hereby certify that to the best of my knowledge, the matter in controversy is not the subject of any other pending action or proceeding and that no other action or proceeding is contemplated by defendants at this time. I further certify that I am not aware of any other parties who should be joined in this action at this time.

DEMAND FOR STATEMENT OF DAMAGES

Pursuant to New Jersey Court Rule 4:5-2, defendants hereby demand that plaintiff furnish a written statement of the amount of damages claimed within five days after service of this Answer.

DEMAND FOR DOCUMENTS TO WHICH COMPLAINT REFERS

Pursuant to New Jersey Court Rule 4:18-2, defendants hereby demand that plaintiff produce copies of each and every document or paper to which the Complaint refers within five days after service of this Answer.

CERTIFICATION OF SERVICE

I hereby certify that on _____, I filed an original and three copies each of this Answer, a Stipulation Extending Defendants' Time to Answer, and a Civil Case Information Statement with the Clerk of the Superior Court of New Jersey, Law Division, _____County, _____, via hand delivery.

I also certify that on _____, I served one copy of each of the foregoing documents upon counsel for plaintiff, _____ at _____, via hand delivery.

Forms

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LAW FIRM
Attorneys for Defendants

BY: _____
ATTORNEY NAME

Dated: _____

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Discrimination

12.15 FORM: Sample Jury Voir Dire Questions

LAW FIRM NAME

ADDRESS

PHONE
Attorneys for Plaintiff

SUPERIOR COURT OF NEW
JERSEY
LAW DIVISION
_____ COUNTY
DOCKET NO. _____

_____,
v. _____,
Plaintiff,
Defendants.

Civil Action
**PLAINTIFF'S PROPOSED JURY
VOIR DIRE QUESTIONS**

Background

1. What is your name?
2. What is your age?
3. Where do you live?
4. How long have you lived at your current address?
5. Do you or your family own or rent your home?
6. What is your marital status?
7. Who lives with you, if anyone, and how are they related to you, if at all?
8. What are or were the occupations of any persons who live with you?
9. Do you have children, and if so, how many and what are their ages and occupations?

Forms**12.15**

10. How far did you go in school?
11. To what social or civic organizations do you belong?
12. Have you ever been a leader in any organization?
13. What hobbies or recreational activities do you enjoy?
14. What television programs do you watch regularly?
15. What types of books, magazines, or newspapers do you read regularly?
16. Do you have any bumper stickers on your car, and if so, what do they say?
17. Have you or any persons you know ever served in the military?

Employment

18. What is your current employment status?
19. If unemployed, are you currently looking for work?
20. What is or was your occupation?
21. Who is your current employer, or who was your last employer?
22. How long have you been employed by your current employer, or how long were you employed by your last employer?
23. What are your job duties?
24. What jobs have you held in the last five years?
25. Have you or any persons you know ever owned a business?
26. Have you or any persons you know ever worked in a supervisory or human resources/personnel position?
27. Have you or any persons you know ever been a witness in a legal proceeding involving an employment dispute?
28. Do you supervise any people in your job?
29. Have you or any persons you know ever participated in any type of investigation at work?

Jury Duty

30. Do you want to serve as a juror?

12.15**Discrimination**

31. Do you feel there is any reason why you would not be able to serve as a juror?
32. Have you ever served on a jury before?
- If so, how many times?
 - In what types of cases?
 - Did the jury deliberate?
 - Did the jury reach a verdict, and if so what was it?
 - If you participated in rendering a jury verdict for a plaintiff in a civil case, what was the amount of the verdict?
33. Will you be able to follow the legal instructions that the Court gives you regardless of your personal feelings as to what the laws should be?
34. Did you know any of the other members of the jury panel before being called for jury duty?

Lawsuits

35. Do you believe that too many lawsuits are being filed?
36. Do you think that money damages awarded by juries in lawsuits are generally too high, too low, or about right?
37. Have you or any persons you know ever sued anyone?
38. Have you or any persons you know ever been sued?

Discrimination

39. Do you believe there is such a thing as _____ discrimination in the workplace?
40. Should someone who believes that he or she is being subjected to _____ discrimination do something about it?
41. Do you think that we need laws that prohibit employers from discriminating against employees on the basis of _____?
42. Have you or any persons you know ever been the subject of _____ discrimination?
43. Have you or any persons you know ever been accused of _____ discrimination?

Forms**12.15**

44. Is it important to you that your workplace be free from _____ discrimination?

45. Do you think that an employer should be held responsible for the unlawful discriminatory acts of its employees?

Retaliation

46. Do you know that it is unlawful for an employer to retaliate against an employee for complaining of something unlawful in the workplace, such as discrimination?

47. Do you agree with that law?

48. Have you or any persons you know ever been subjected to retaliation for complaining of something unlawful in the workplace, such as discrimination?

49. Have you or any persons you know ever been accused of retaliating against someone for complaining of something unlawful in the workplace, such as discrimination?

Firing

50. Have you or any persons you know ever been fired?

51. Have you or any persons you know ever fired anyone?

52. Do you believe that employers should be able to fire employees for any reasons whatsoever?

Bias

53. Do you have any prior knowledge regarding this case?

54. Have you or any persons you know ever been employed by any company with the word _____ in its name, the law firm _____, or the law firm _____?

57. Do you know any of the following people?

a. _____

b. _____

c. _____

d. _____

12.16

Discrimination

12.16 FORM: Sample Jury Charge— Disparate Treatment—Pretext

LAW FIRM NAME

ADDRESS

PHONE

Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY LAW DIVISION COUNTY DOCKET NO.

Plaintiff, Defendants. v.

Civil Action PROPOSED JURY CHARGE

The plaintiff claims that the defendant unlawfully discriminated against him/her by [insert alleged adverse action, such as: terminating his/her employment, failing to promote him/her, etc]. because of his/her [choose an applicable category: race, religion, etc.1]. The defendant denies this and instead maintains that it [insert alleged adverse action] the plaintiff because of plaintiff's [insert the defendant's explanation, such as plaintiff's poor work performance, etc]. If the defendant did, in fact, [insert alleged adverse action] the plaintiff because of plaintiff's [insert protected category], that would be unlawful under The New Jersey Law Against Discrimination.

It is plaintiff's burden to prove that it is more likely than not that the defendant engaged in intentional discrimination because of the plaintiff's [insert protected category]. That is the ultimate issue you must decide: did the defendant [insert alleged adverse action] because of the plaintiff's [insert

1 See N.J.S.A. 10:5-12 for prohibited categories of discrimination. Although this provision of the statute does not expressly indicate that handicapped individuals are members of a protected class, this is made clear in N.J. Stat. Ann. 10:5-4.1. See Anderson v. Exxon, 89 N.J. 483, 492 (1982).

Forms**12.16**

protected category]. Plaintiff may do this directly, by proving that a discriminatory reason more likely than not motivated the defendant's action, or indirectly, by proving that the employer's stated reason for its action is not the real reason for its action.

You may find that the defendant had more than one reason or motivation for its actions. For example, you may find that the defendant was motivated both by the plaintiff's *[insert protected category]* and by other, nondiscriminatory factors, such as the plaintiffs' job performance. To prevail, the plaintiff is not required to prove that his/her *[insert protected category]* was the only reason or motivation for defendant's actions. Rather, the plaintiff must only prove that his/her *[insert protected category]* played a role in the decision and that it made an actual difference in the defendant's decision. If you find that the plaintiff's *[insert protected category]* did make an actual difference in the defendant's decision, then you must enter judgment for the plaintiff. If, however, you find that the defendant would have made the same decision regardless of the plaintiff's *[insert protected category]*, then you must enter judgment for the defendant.²

Because direct proof of intentional discrimination is often not available, plaintiff is allowed to prove discrimination by circumstantial evidence. In that regard you are to evaluate all of the indirect evidence of discrimination that you find was presented during the trial.

In particular, you should consider whether the explanation given by the defendant for its actions was the real reason for its actions. If you don't believe the reason given by the defendant is the real reason the defendant *[insert alleged adverse action]* the plaintiff, you may, but are not required to find that the plaintiff has proven his/her case of discrimination. You are permitted to do so because, if you find the employer has not told the truth about why it acted, you may conclude that it is covering up for discrimination. However, while you are permitted to find discrimination based upon your disbelief of the employer's stated reasons, you are not required to do so. This is because you may conclude that the employer's stated reason is not the real reason, but that the real reason is something other than illegal discrimination

Let me give you an example of what I am talking about. Assume that an employee claims she was discharged because of her age and the

² *Bergen Commercial Bank v. Sisler*, 157 N.J. 188, 207 (1999); *Greenberg v. Camden County Vo-Tech Schools*, 310 N.J. Super. 189, 198 (App. Div. 1998); *Slohoda v. United Parcel Service, Inc.*, 207 N.J. Super. 145, 155 (App. Div. 1986). This charge incorporates the concept of, but does not use the phrase "determinative factor," because it is not as understandable to a jury. See *Gehring v. Case Corp.*, 43 F.3d 340, 343-344 (7th Cir. 1994).

12.16**Discrimination**

employer claims she was discharged because of excessive absenteeism. If you were to conclude that the employer's explanation is false and that it did not really discharge the employee because of excessive absenteeism, you would be permitted to find that the real reason was because of the employee's age. However, you would not be required to find that the real reason was because of the employee's age, because you might find that the real reason had nothing to do with illegal discrimination. For example, you might find that the real reason was because the employer simply did not like the employee.

Plaintiff at all times bears the ultimate burden of convincing you that it is more likely than not that defendant engaged in intentional discrimination. To decide whether plaintiff has proved intentional discrimination, you should consider all of the evidence presented by the parties, using the guidelines I gave you in the beginning of my instructions regarding evaluating evidence generally, such as weighing the credibility of witnesses. Keep in mind that in reaching your determination of whether the defendant engaged in intentional discrimination, you are instructed that the defendant's actions and business practices need not be fair, wise, reasonable, moral or even right, so long as the plaintiff's *[insert protected category]* was not a motivating factor for the *[insert alleged adverse action]*.³

I remind you that the ultimate issue you must decide is whether the defendant engaged in illegal [insert protected category] discrimination by [insert alleged adverse action] the plaintiff, and that the plaintiff has the burden to prove that discrimination occurred.

³ *Viscik v. Fowler Equip. Co. Inc.*, 173 N.J. 1 (2002) (noting that "[t]he employer's subjective decision making may be sustained even if unfair"); *Maiorino v. Schering Plough Corp.*, 302 N.J. Super. 323, 345 (App. Div.) (noting that "[t]here is no principle of law that requires that a business' decision be popular with employees; [a]s long as the decision is not based on unlawful . . . discrimination, 'the courts have no business telling [companies]. . . how to make personnel decisions' "); *certif. denied*, 152 N.J. 189 (1997); *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994).