379 N.J. Super. 142, *; 877 A.2d 291, **;
2005 N.J. Super. LEXIS 221, ***; 96 Fair Empl. Prac. Cas. (BNA) 462

J.M.L., a minor, by and through her Guardian Ad Litem, T.G., Plaintiffs-Appellants, vs. A.M.P., Individually, A.M.P. and L.P. d/b/a S., INC., A., INC. and D.T., Defendants-Respondents.

DOCKET NO. A-4034-03T3

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

379 N.J. Super. 142; 877 A.2d 291; 2005 N.J. Super. LEXIS 221; 96 Fair Empl. Prac. Cas. (BNA) 462

May 31, 2005, Argued
July 8, 2005, Decided

SUBSEQUENT HISTORY: [***1] Approved For Publication July 8, 2005.

PRIOR HISTORY: On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-3291-00.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant minor, by and through her guardian ad litem, filed a complaint under the New Jersey Law Against Discrimination, N.J. Stat. Ann. § § 10:5-1 to 10:5-49, against her employer and appellees, the franchisor and its owner, in the Superior Court of New Jersey, Law Division, Burlington County. Summary judgment was awarded to the employer and to the franchisor and its owner. The minor appealed but settled with the employer.

OVERVIEW: The minor worked as an instructor at a karate studio that the employer owned and which was a franchise of the franchisor. She commenced an affair with her employer. Following her employer's indictment and conviction of second degree sexual assault, the minor claimed that she was the victim of sexual harassment. However, the trial court granted summary judgment to the employer and the franchisor and its owner because the court found that the minor welcomed the employer's advances. On appeal, the court affirmed the order granting summary judgment, although in doing so, the court rejected the notion that a minor could consent to or welcome the prohibited conduct. The court affirmed because the facts, viewed in the light most favorable to the minor, did not allow a finding that the franchisor and its owner were the minor's employer or direct supervisor, or that the franchisor and its owner were the employer or direct supervisor of the minor's employer, or that the franchisor and its owner aided or abetted the employer's actions under N.J. Stat. Ann. § 10:5-12e, or that the franchisor's and its owner's status as franchisor exposed them to liability on account of the employer's actions.

OUTCOME: The judgment was affirmed.

LexisNexis(R) Headnotes

Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment
Labor & Employment Law > Discrimination > Sexual Harassment > Quid Pro Quo
[HN1] The Supreme Court of New Jersey recognizes two forms of sexual harassment. While quid pro quo harassment conditions employment on submission to sexual demands, hostile work environment sexual harassment occurs when an employer harasses an employee because of his or her sex to the point at which the working environment becomes hostile.

Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment
[HN2] The Supreme Court of New Jersey has identified the following elements necessary to make out a prima facie case of hostile work environment sexual discrimination under the New Jersey Law Against Discrimination, N.J. Stat. Ann. § § 10:5-1 to 10:5-49: (1) the conduct would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive.

Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment
[HN3] A consensual sexual relationship between employees negates the elements of a hostile environment sexual harassment claim.

Criminal Law & Procedure > Criminal Offenses > Sex Crimes > Sexual Assault
Criminal Law & Procedure > Defenses > Consent
[HN4] The New Jersey Legislature has determined that sexual relations between an adult and a 14-year-old child constitutes aggravated sexual assault, a first degree offense. N.J. Stat. Ann. § 2C:14-2a. Consent by the victim is not a defense. N.J. Stat. Ann. § 2C:2-10c(2). In declaring the conduct a criminal offense, the Legislature has declared that it is against the public policy of the State of New Jersey for an adult to engage in sexual relations with a 14-year-old girl. As a matter of public policy, it has decreed that a 14-year-old girl is not mature enough to consent to or to welcome the sexual advances of an older man. In doing so, the Legislature has established an irrebuttable presumption that sexual relations under the circumstances outlined in N.J. Stat. Ann. § 2C:14-2 cause harm to the young victim.

Civil Procedure > Summary Judgment > Standards of Review
[HN5] Because an appellate court will review a summary judgment by the same standard as the motion judge, the appellate court may elect to examine an argument even though it was not addressed by the motion judge.

Civil Procedure > Summary Judgment > Burdens of Production & Proof
[HN6] A party may defeat a motion for summary judgment by demonstrating that the evidential materials relied upon by the moving party, considered in light of the applicable burden of proof, raise sufficient credibility issues to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

Civil Procedure > Summary Judgment > Summary Judgment Standard
[HN7] In determining whether there is a genuine issue of fact at summary judgment, a judge must decide whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a genuine issue of material fact for purposes of N.J. Ct. R. 4:46-2. Thus, when the evidence is so one-sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment.

Business & Corporate Entities > Agency > Duties & Liabilities > Unlawful Acts of Agents
Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment
[HN8] Liability of an employer for sexual harassment of an employee by a co-employee or supervisor generally invokes agency principles.

Labor & Employment Law > Discrimination > Sexual Harassment > Coverage & Definitions
Labor & Employment Law > Discrimination > Sexual Harassment > Hostile Work Environment
Labor & Employment Law > Discrimination > Sexual Harassment > Prevention & Correction
[HN9] It is unlawful under the New Jersey Law Against Discrimination (LAD), N.J. Stat. Ann. § § 10:5-1 to 10:5-49, whether or not a person is an employer or employee, to aid or abet any of the acts forbidden by the LAD. N.J. Stat. Ann. § 10:5-12e. The Supreme Court of New Jersey has identified five factors to determine whether a defendant provided substantial assistance to the principal actor: (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.

COUNSEL: Stephen R. Dumser argued the cause for appellants (Gercke, Dumser & Sierzega, attorneys; Mr. Dumser and Ronald P. Sierzega, on the brief).

Gerard X. Smith argued the cause for respondents A., Inc. and D.T. (Naulty, Scaricamazza & McDevitt, attorneys; Mr. Smith and Susan B. Pliner, on the brief).

Ballard, Spahr, Andrews & Ingersoll, attorneys for respondent S., Inc. (Michele M. Fox, Edward T. Groh and Stuart A. Platt, on the brief).

JUDGES: Before Judges Cuff, Weissbard and Hoens. The opinion of the court was delivered by CUFF, J.A.D.

OPINIONBY: CUFF

OPINION:

[**293] [*145] The opinion of the court was delivered by CUFF, J.A.D.

When J.M.L. was fourteen, she was employed as an instructor at a karate studio. J.M.L. and A.M.P., her forty-one year old employer, commenced an almost year long affair. Following A.M.P.'s indictment and conviction of second degree sexual assault, contrary to N.J.S.A. 2C:14-2c(2), J.M.L., through her guardian ad litem, filed a complaint under the Law Against Discrimination (LAD) n1 against her [***2] employer and the franchisor of the karate [*146] studio. She claimed that she was the victim of sexual harassment. Summary judgment was granted in favor of the corporate defendants on the basis that A.M.P.'s advances were welcomed by J.M.L. Plaintiff appeals. Due to the settlement of all claims between J.M.L. and her employer, we consider only the order granting summary [**294] judgment in favor of the franchisor. We affirm, albeit for reasons different from those advanced by the motion judge.

n1 N.J.S.A. 10:5-1 to -49.

A.M.P. and his wife, L.P., owned a karate studio in Burlington County. It operated under a corporate name, S., Inc. The studio was a franchise of A., Inc. D.T. is the owner of A., Inc. J.M.L. had been a student at A.M.P.'s studio since she was ten years old. In June 1999, J.M.L. began working at the studio as an instructor for the younger children. In July 1999, J.M.L. and A.M.P. started a sexual relationship that lasted for seven months. A.M.P. was forty-one years old; J.M.L. was fourteen. [***3] The sexual encounters occurred in the studio and outside the studio.

In February 2000, J.M.L. ceased her part-time employment at the studio at her mother's insistence. In March 2000, A.M.P. was indicted and subsequently pled guilty to one count of sexual assault.

On November 22, 2000, J.M.L. and her parents filed a complaint against A.M.P. and his wife, L.P. individually and as owners of the karate studio in which J.M.L. was employed. The complaint alleged that J.M.L. was the victim of sexual harassment in violation of the LAD. The complaint was amended four times. The first amended complaint asserted a claim against S., Inc., the corporate entity that operated the studio. The second amended complaint alleged negligence against L.P. The third amended complaint alleged that A.M.P. and L.P. violated N.J.S.A. 2A:61B-1 (statutory civil action for sexual abuse). The fourth amended complaint alleged that A., Inc. and D.T., the franchisor of the karate studio, violated the LAD. A default judgment was entered against A.M.P. on March 19, 2004. A settlement was reached with L.P.

[*147] J.M.L. filed a motion to bar "welcomeness" as an affirmative defense against the LAD [***4] claims and to preclude any evidence at trial that A.M.P.'s advances were welcome. S., Inc. filed a cross-motion for summary judgment on Count II (sexual harassment). After oral argument on the motion, but before a decision had been delivered, A., Inc. and D.T. filed a motion for summary judgment on the LAD claims. After another round of oral arguments, the motions for summary judgment were granted and the complaint was dismissed against both corporate defendants and D.T. Prior to oral argument of this appeal, S., Inc. reached a settlement with J.M.L.

In her oral opinion, the motion judge held that in order to establish a claim of sexual harassment, a plaintiff must demonstrate that the actions of a co-employee or employer must have a negative effect on her, such as dismissal or an unwanted or undesired alteration of the terms and conditions of employment. She also held that a co-employee or employer may defend a claim of sexual harassment with proof that the behavior was welcome. Finding no exception to

these principles when the victim is a minor, the motion judge granted the corporate defendants' motions for summary judgment and implicitly denied plaintiff's motion to bar the affirmative [***5] defense of welcomeness. The motion judge did not address A., Inc.'s alternative basis for summary judgment, that as a franchisor of the karate studio, it cannot be liable under the LAD as plaintiff's employer.

We commence our review with a brief overview of the nature of a sexual harassment claim under the LAD. In Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 601, 626 A.2d 445 (1993), [HN1] the Court recognized two forms of sexual harassment. While quid pro quo harassment conditions employment on submission to sexual demands, "hostile work environment sexual harassment . . . occurs when an employer . . . harasses an employee because of his or [**295] her sex to the point at which the working environment becomes hostile." Ibid.

[HN2] [*148] The Court identified the following elements necessary to make out a prima facie case of hostile work environment sexual discrimination under the LAD: "(1) [the conduct] would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive." Id. at 603-04. [***6] The unique problem in this case is whether J.M.L.'s failure to complain of A.M.P.'s sexual advances and her profession of affection for A.M.P. bars her sexual harassment claim. Neither the LAD nor case law addresses this issue in the context of a victim who is a minor. Various cases recognize that [HN3] a consensual sexual relationship between employees negates the elements of a hostile environment sexual harassment claim. See Erickson v. Marsh & McLennan Co., 117 N.J. 539, 557, 569 A.2d 793 (1990); Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super. 55, 78, 860 A.2d 945 (App. Div. 2004). A., Inc. urges that the standard should be no different for a minor and further contends that the fact that the same conduct constitutes a first or second degree offense is irrelevant.

[HN4] The Legislature has determined that sexual relations between an adult and a fourteen year old child constitutes aggravated sexual assault, a first degree offense. N.J.S.A. 2C:14-2a. Consent by the victim is not a defense. N.J.S.A. 2C:2-10c(2); State v. Martin, 235 N.J. Super. 47, 56-58, 561 A.2d 631 (App. Div.), certif. [***7] denied, 117 N.J. 669, 569 A.2d 1359 (1989). In declaring the conduct a criminal offense, the Legislature has declared that it is against the public policy of this State for an adult to engage in sexual relations with a fourteen year old girl. As a matter of public policy, it has decreed that a fourteen year old girl is not mature enough to consent to or to welcome the sexual advances of an older man. In doing so, the Legislature has established an irrebutable presumption that sexual relations under the circumstances outlined in N.J.S.A. 2C:14-2 cause harm to the young victim. We discern no basis to conclude that this public policy is [*149] subject to dilution in the context of workplace relationships between a minor and an adult. Thus, we reject, as error, this basis for entry of summary judgment in favor of A., Inc.

In support of its motion for summary judgment, A., Inc. also argued that the evidence presented in support of and in opposition to its motion, viewed in the light most favorable to plaintiff, did not allow a rational factfinder to hold it, the franchisor, liable for the acts of one of its franchisees. [HN5] Because we review a summary judgment by the same [***8] standard as the motion judge, Prudential Property & Casualty Insurance Co. v. Boylan, 307 N.J. Super. 162, 167, 704 A.2d 597 (App. Div. 1998), we elect to examine this argument even though it was not addressed by the motion judge.

[HN6] "[A] party may defeat a motion for summary judgment by demonstrating that the evidential materials relied upon by the moving party, considered in light of the applicable burden of proof, raise sufficient credibility issues 'to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" D'Amato v. D'Amato, 305 N.J. Super. 109, 114, 701 A.2d 970 (App. Div. 1997) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523, 666 A.2d 146 (1995)). [HN7] In determining whether there is a genuine issue of fact, the judge must decide whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are [**296] sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue [***9] should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2." Brill, supra, 142 N.J. at 540. Thus, "when the evidence 'is so one-sided that one party must prevail as a matter of law,' . . . the trial court should not hesitate to grant summary judgment." Ibid. (citation omitted).

We have been unable to locate any case in this State that has addressed franchisor liability for hostile work environment [*150] sexual discrimination. n2 [HN8] Liability of an employer for sexual harassment of an employee by a co-employee or supervisor generally invokes agency principles as set forth in the Restatement (Second) of Agency Section 219. Lehmann, supra, 132 N.J. at 619. Other jurisdictions have invoked agency principles to determine the imposition of liability on a franchisor for the tortious or criminal acts of a franchisee. The degree of control, the actual

exercise of control and the use of slogans or the issuance of assurances concerning the safety of patrons may expose a franchisor to liability for criminal activity by a franchisee [***10] or criminal activity on or near the franchised premises. See Franchisor's Tort Liability for Injuries Allegedly Caused by Assault or Other Criminal Activity on or Near Franchise Premises, 2 A.L.R.5th 369 (1992).

n2 Connolly v. Burger King Corp., 306 N.J. Super. 344, 703 A.2d 941 (App. Div. 1997) is not apposite. First, the opinion concerns only a discovery dispute. More importantly, the franchisor was a defendant because one of its employees was accused of sexually harassing a female employee at one of the franchises during the franchisor's periodic inspection and training sessions. Id. at 346.

The Court has addressed, however, the liability of the owner of a network of auto dealerships for sexual harassment of an employee. In Tarr v. Ciasulli, 181 N.J. 70, 853 A.2d 921 (2004), a woman employed as a finance and insurance manager by an auto dealer brought a hostile work environment claim against her direct employer, the corporate group of auto [***11] dealerships, and the individual owner of all of the network of dealerships. At trial, the judge dismissed the claims against the individual owner. Id. at 73. The claim against the individual owner was predicated on a theory that he had aided and abetted the sexual harassment about which plaintiff complained. Id. at 83.

[HN9] It is unlawful under the LAD, whether or not a person is an employer or employee, to aid or abet any of the acts forbidden by the LAD. N.J.S.A. 10:5-12e. Applying the principles governing concert liability set forth in section 876(b) comment d of the Restatement (Second) of Torts, [*151] the Court identified five factors to determine whether a defendant provided substantial assistance to the principal actor: "(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, supra, 181 N.J. at 84. Ultimately, the Court found that the evidence was inadequate to impose liability on the individual [***12] owner of the network of auto dealerships. Justice Wallace wrote:

There was no evidence that Ciasulli encouraged any of the wrongful conduct against plaintiff, that he assisted the [**297] wrongdoers, or that he was even present when the wrongful conduct occurred. At best, the record discloses that Ciasulli, as the supervisor in the network of auto dealerships, negligently supervised his employees. That is insufficient to conclude that he provided substantial assistance to the wrongdoers to impose individual liability under N.J.S.A. 10:5-12e.

[Id. at 85.]

Tarr is instructive to us in the franchise context because it does not confine our consideration to whether a franchisor may be considered an employer and directs our attention to whether the franchisor may be considered an aider or abettor. The focus on aiding or abetting also indicates that liability will not turn on the passive status of franchisor.

Viewing the facts in the light most favorable to plaintiff, we find that A., Inc.'s role as franchisor does not allow imposition of liability, direct or vicarious, under the LAD. Neither D.T. nor A., Inc. owned the franchise [***13] operated by defendant A.M.P. D.T., as the owner of A., Inc., conducted monthly members meetings, but provided little or no guidance on the day-to-day operations of the franchises. D.T. and his wife were members of the board that issued black belts to qualifying students from all franchises. D.T. provided marketing and sales guidance to franchisees but franchisees were not required to use a pre-packaged marketing plan or contribute to a marketing plan devised by A., Inc. Each franchise was required to carry franchise branded merchandise at each site.

[*152] Neither D.T. nor A., Inc. had any role in hiring or terminating employees or any other personnel issues at any franchise. Each franchise was individually owned and operated as an individual business.

D.T. did observe plaintiff sitting on A.M.P.'s lap on one occasion; yet A.M.P.'s niece was sitting on his lap at the same time. D.T. thought A.M.P.'s actions were inappropriate, but there was no suggestion that A.M.P.'s actions were indicative of a sexual relationship with plaintiff. When D.T. was informed in late December 1999 or early January 2000 by an employee of A.M.P.'s franchise that the relationship was sexual, D.T. spoke to the [***14] source of the complaint and met immediately with A.M.P., who denied any impropriety. Nevertheless, D.T. consulted an attorney and

sent A.M.P. a letter warning him about the allegations of impropriety and requesting his cooperation in an investigation. The letter closed with a threat to terminate the franchise. Soon thereafter, plaintiff left A.M.P.'s employ, the relationship ceased, and A.M.P. was arrested.

These facts do not support a finding that D.T. was plaintiff's employer or direct supervisor or A.M.P.'s employer or direct supervisor or that he aided or abetted the actions of A.M.P. A rational factfinder could not find that D.T. or A., Inc. had actual knowledge of the relationship between plaintiff and A.M.P. or that D.T. and A., Inc. had a basis to form a reasonable suspicion of an illicit relationship before late December 1999.

Moreover, the relationship between S., Inc., the franchisee, and A., Inc., the franchisor, does not evince the degree of control that would warrant the imposition of vicarious liability under agency principles or liability as an aider or abettor. There is no evidence that A., Inc, compelled, coerced, encouraged or assisted the formation and maintenance [***15] of the illicit relationship.

Accordingly, we affirm the order granting summary judgment, although in doing so, we reject the notion that a minor may consent to or welcome the prohibited conduct. [**298] We affirm because [*153] the facts, viewed in the light most favorable to plaintiff, do not allow a finding that D.T. or A., Inc. were plaintiff's employer or direct supervisor, or A.M.P.'s employer or direct supervisor, or that either aided or abetted A.M.P.'s actions, or that their status as franchisor exposed them to liability on account of A.M.P.'s actions.

Affirmed