

**Gause, John P**

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**From:** Gause, John P  
**Sent:** Wednesday, May 20, 2009 10:32 AM  
**To:** Lelli, Barbara  
**Subject:** Aid and Abet Standard  
**Attachments:** Tarr.doc

Barb,

Here is the standard that I think we should use to establish an "aid or abet" claim under 4553(10)(D). It is taken from a New Jersey Supreme Court opinion, *Tarr v. Ciasulli*, 853 A.2d 921, 929 (N.J. 2004). A copy is attached.

John

Section 876(b) of the Restatement imposes concert liability on an individual if he or she "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." We agree that the *Restatement* provides the proper standard by which to define the terms "aid" or "abet" under the LAD. Also, the *Restatement* definition is consistent with the common usage of those terms. Thus, 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." *Hurley, supra*, 174 F.3d at 127 (citations omitted).

With respect to that determination, the comments to section 876 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. *Restatement (Second) of Torts, supra*, § 876(b) comment d; *Hurley, supra*, 174 F.3d at 127 n. 27.

Applying those factors here, we conclude that plaintiff failed to present evidence that Ciasulli aided and abetted the employees in the sexual harassment of plaintiff. There was no evidence that Ciasulli encouraged any of the wrongful conduct against plaintiff, that he assisted the 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. Consequently, we affirm the trial court's dismissal of the complaint against Ciasulli.

John P. Gause  
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