

**To: New Jersey Law Revision Commission**  
**From: Samuel M. Silver, Counsel**  
**Re: Definition of “legal representative” in the context of the law against discrimination**  
**N.J.S. 10:5-5(e) (*Thompkins v. Thomson*)**  
**Date: September 10, 2018**

## MEMORANDUM

### Executive Summary

In an attempt to eradicate discrimination in the workplace, the “Law Against Discrimination” (LAD) prohibits an employer from: refusing to hire or to employ; to bar or to discharge; or, to unfairly compensate an individual based on the their “... race, creed, color, national origin, ancestry, age, [or] marital status.”<sup>1</sup> For those pursuing a claim under the LAD, the identity of their employer may be unclear when a third-party is ordered assume the management, administration, and operation of a workplace.

Staff seeks the Commission’s approval to conduct research and outreach to determine whether defining the term “legal representatives” would further the legislative goals of the LAD.

### Background

On March 17, 2003, Acting Attorney General Peter C. Harvey ordered the Camden County Prosecutor to “supersede the management, administration[,] and operation” of the Camden City Police Department (the “Department”).<sup>2</sup> In response to the Attorney General’s order, the Camden County Freeholders executed a consulting agreement (“Agreement”) with an out-of-state, third party corporation named Venco.<sup>3</sup>

Venco, pursuant to its Agreement with the County of Camden, was responsible for providing “law enforcement services **for the [Camden County] Prosecutor**, the Camden Police Department and the County of Camden.”<sup>4</sup> Arturo Venegas, the president of Venco, assumed numerous responsibilities on behalf of the Prosecutor. The Agreement specified that Venegas would be responsible for the “daily management” of the Department.<sup>5</sup> In addition, he would represent the Prosecutor in overseeing all police department activities.<sup>6</sup> Venegas was also required to report to the Prosecutor about deficiencies in the Department and provide him with the plan to correct them.<sup>7</sup> Venegas’s authority was not limited to departmental oversight.

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<sup>1</sup> N.J.S. 10:5-12(a).

<sup>2</sup> *Tompkins v. Thomson*, 2017 WL 2730256 \*1 (App. Div. June 26, 2017), *cert. denied*, 231 N.J. 179 (2017).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (Emphasis added).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

Arturo Venegas was given the title of Supersession Executive.<sup>8</sup> In his executive capacity, he was to develop policies and procedures to modernize practices in the police department to reflect the generally accepted national standards.<sup>9</sup> In addition, he was to “[s]et forth clear standards of performance for the police department and its employees and implement a system of progressive discipline...”<sup>10</sup> Mr. Venegas was also to support the development of managers through mentoring and training.<sup>11</sup> Finally, he was authorized to “[b]ring employee groups into the planning and implementation process so they felt a part of the vision for policing Camden...”<sup>12</sup>

The Plaintiff was employed by the Camden City Police Department from 1986 until his termination in 2011.<sup>13</sup> Incidents, alleging acts of discrimination and retaliation between January 2006 and January 2008, were detailed in the Plaintiff’s complaint.<sup>14</sup> Specifically, the Plaintiff alleged that Venegas: treated him in a condescending and derogatory manner; ordered or authorized others to break into and search his office; micromanaged his duties and sought to have him disciplined; arbitrarily passed him over for training opportunities; and, generally criticized his performance.<sup>15</sup> Finally, plaintiff alleged that his reports of discriminatory conduct were ignored by the Police Chief.<sup>16</sup>

In response to the complaint, and prior to trial, the Prosecutor moved for summary judgment.<sup>17</sup> Despite acknowledging the Attorney General’s Supersession Order, the trial court found that there was no evidence that the Prosecutor was the Plaintiff’s employer.<sup>18</sup> The trial court found instead that the plaintiff’s employer was at all times the City of Camden.<sup>19</sup> After finding that there was no fundamental employment relationship between the plaintiff and the Prosecutor, the trial court concluded that the Prosecutor had no liability and granted his motion for summary judgment.<sup>20</sup> All claims against Venegas were voluntarily dismissed by the plaintiff.<sup>21</sup> The jury returned a verdict of no cause of action as against the City and its officials.<sup>22</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at \*2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at \*3.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at \*1.

<sup>22</sup> *Id.*

The plaintiff appealed the dismissal of the Prosecutor from this case along with various evidentiary rulings.<sup>23</sup>

### Analysis

In *Tomkins v. Thomson*<sup>24</sup>, the Appellate Division recognized that New Jersey’s LAD<sup>25</sup> defines the term “employer.”<sup>26</sup> That term, for purposes of the LAD, includes “all persons as defined in subsection a. [...] and includes “the State, any political or civil subdivision thereof, and all public officers, agencies, boards or bodies.”<sup>27</sup> A statutory reference to subsection a. expands the definition of the word employer to include, “one or more individuals, partnerships, associations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers and fiduciaries.”<sup>28</sup> An analysis of whether the Camden County Prosecutor was one of the “persons” enumerated in N.J.S. 10:5-5(a), however, was not included in the Court’s opinion.

Rather than examine the term “person,” set forth in N.J.S. 10:5-5(a), to determine whether the Prosecutor was the plaintiff’s employer, the Appellate Division conducted its analysis using the twelve-factor test traditionally reserved for determining whether a plaintiff is an employee or an independent contractor in hostile work environment claims under the LAD.<sup>29</sup> The Appellate Division recognized that the federal courts have set forth a number of tests which employ common law principles to interpret statutes that contain the term “employee” but do not helpfully define it.<sup>30</sup> The question raised in this case, however, was not whether the plaintiff was an employee or an independent contractor. Rather, the issue was whether the Camden County Prosecutor was the plaintiff’s employer by virtue of the Attorney General’s March 17, 2003 supersession order.

Without referencing N.J.S. 10:5-5(a), the Appellate Division concluded that the Attorney General’s “Supersession Order,” coupled with the Freeholder’s execution of a consulting agreement with a third-party, “did not create a legally recognizable employment relationship between the Prosecutor and the municipal police officers....”<sup>31</sup> The Appellate Division therefore reasoned that the lack of an employment relationship between the plaintiff and the defendant precluded the Prosecutor’s liability under the LAD.<sup>32</sup> Ultimately, the Appellate Division

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<sup>23</sup> *Id.* The plaintiff also appealed the trial court rulings that excluded evidence he believed to be admissible and essential to proving his causes of action. These rulings exceed the scope of the instant memorandum.

<sup>24</sup> 2017 WL 2730256 \*1 (App. Div. June 26, 2017) , *cert. denied*, 231 N.J. 179 (2017).

<sup>25</sup> N.J.S. 10:5-1 to -49.

<sup>26</sup> N.J.S. 10:5-5(e); *see also* N.J.S. 10:5-5(a) defining a “person” to include the “legal representatives” of the State and political or civil subdivisions thereof.

<sup>27</sup> N.J.S. 10:5-5(e); *see also Tompkins v. Thomson*, 2017 WL 2730256 at \*4.

<sup>28</sup> N.J.S. 10:5-5(a).

<sup>29</sup> 2017 WL 2730256 at \*4.

<sup>30</sup> *See Pukowsky v. Caruso*, 312 N.J. Super. 171, 182-183 (App. Div. 1998).

<sup>31</sup> *Tompkins v. Thomson*, 2017 WL 2730256 at \*5.

<sup>32</sup> *Id.*

affirmed the trial court's conclusion that the Prosecutor did not serve as the Plaintiff's de facto employer.<sup>33</sup>

Although the Prosecutor was ordered by the Acting Attorney General to “supersede the management, administration[,] and operation” of the Camden City Police Department, the Appellate Division found that the Prosecutor exercised no acts of control over plaintiff's employment – these duties having been delegated to a third party who had been retained by the Freeholders.<sup>34</sup> Thus, the decision of the Appellate Division brings to the fore the question of whether an organization or person ordered to take control of an entity can avoid liability under the LAD by contracting with a third-party to supersede the management, administration and operation of the entity. It does not appear to be clear under existing law whether these third parties should be considered “legal representatives” subject to liability under the LAD.

### **Conclusion**

In an effort to prevent the proliferation of malfeasance, it is not unusual for a supervisory entity or individual to be placed in charge of the daily affairs of an individual, partnership, association, organization, or corporation. Similarly, it is not uncommon for a supersession order to be entered requiring that a governmental agency take control of a public office, department, agency, board, or body. It would appear to run counter to the remedial purposes of the LAD if these entities could engage in prohibited discriminatory behavior without consequence because they contracted with a third party to perform their duties as the employer.

Presently, the term “legal representative,” as set forth in N.J.S. 10:5-5(a) is not defined for purposes of the LAD. Staff seeks authorization from the Commission to conduct additional research and outreach, to determine whether including a definition for the term “legal representative” would be of assistance in furthering the purpose of the LAD in instances such as those in *Tomkins v. Thomson*.

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<sup>33</sup> *Id.* at \*6.

<sup>34</sup> *Id.*