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New Jersey Supreme Court Clarifies Standard For Religious Discrimination Claims

On July 31, 2008, the New Jersey Supreme Court issued an important decision clarifying the legal standard for hostile work environment claims based on religious discrimination, holding that religious harassment, racial harassment, and sexual harassment claims must be treated identically in terms of proof. *Cutler v. Dorn*, A-51 (N.J. July 31, 2008). The decision brings an end to the confusion caused by another Supreme Court case, *Taylor v. Metzger*, 152 N.J. 490 (1998), and an older Appellate Division case, *Heitzman v. Monmouth County*, 321 N.J. Super. 133 (1999), which together held that racial harassment claims brought by African-Americans would receive preferential treatment while religious discrimination claims brought by Jewish plaintiffs were to be judged by a tougher standard.

In *Cutler*, a Jewish police officer filed a NJLAD claim alleging that the defendants created, perpetuated, and failed to remediate a hostile work environment based upon his religion or ancestry. Plaintiff alleged that in 1999, he heard one officer blurt out to another officer "those dirty Jews," a remark for which that co-worker apologized within one-half hour, and for which he received a disciplinary letter of counseling. He also claimed that in a subsequent and unrelated disciplinary hearing involving another officer, this same officer described his comment in plaintiff's presence as "Let's get rid of all those dirty Jews," reopening the wound inflicted by his earlier comment. Plaintiff also alleged that, among other things, someone placed an Israeli flag in his locker in 1996,

and about two weeks later, someone placed a sticker of the German Republic flag above it; and at Passover 1999, a supervisor advised him that he could not wear a yarmulke to work. At trial, the jury found that plaintiff proved he was subjected to a hostile work environment based on his religion or ancestry, but awarded him zero damages. The trial court then denied Haddonfield's motion for judgment notwithstanding the verdict ("JNOV").



The Appellate Division reversed the trial court's denial of Haddonfield's NOV motion. *Cutler v. Dorn*, 390 N.J. Super. 238 (2007). The court held that while the NJLAD prohibits harassment in the workplace that creates a hostile work environment, it is not a civility code; epithets or comments that are merely offensive do not create a hostile work environment. The court must look at such circumstances as the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.

The Appellate Division found that although the comments and pranks were offensive, plaintiff was a full participant in a work environment in which the officers and some supervisors, including the plaintiff, participated in pranks, teasing, and "breaking each others chops." The plaintiff had a key to one of two locked cabinets in which officers maintained and distributed a

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“humor file,” with material of a racial or ethnic nature directed at various groups, including Jews. Plaintiff admitted that he shared and enjoyed this material, and never complained prior to 1999. He also participated in ribbing directed at other officers based upon their religion, particularly those of the Christian faith. The court observed that until 1999, plaintiff never objected or complained, evidencing “acquiescence in the activities as part of the give-and-take in which he regularly participated.”

The Appellate Division, in reversing the trial court, struggled to distinguish the case from *Taylor* and *Heitzman*. In *Taylor*, the New Jersey Supreme Court affirmed the state’s power to punish a county sheriff who directed a single racial epithet towards an African American. The Court announced that it would interpret the NJLAD differently for African Americans because of their “unique history” of oppression.

One year later, in *Heitzman*, the Appellate Division dismissed a claim brought by a Jewish worker who was subjected to a constant barrage of anti-Semitic slurs. Although the court agreed that calling a Jewish woman a “Jewish bitch,” and telling the plaintiff that, “if Hitler were alive, he would make a lampshade out of you,” was both offensive and anti-Semitic, the court decided that no reasonable Jewish person could

conclude that the anti-Semitic comments could create a hostile or abusive work environment.

In *Cutler*, the Supreme Court, while agreeing that there were no monetary damages, reversed the Appellate Division, making it clear, once and for all, that religious harassment claims are to be treated no differently than other claims for harassment or discrimination. Justice Jaynee LaVecchia, writing for a unanimous Court, stated that “[c]onsistent with this state’s strong policy against any form of discrimination in the workplace, we hold that the threshold for demonstrating a religion-based, discriminatory hostile work environment cannot be any higher or more stringent than the threshold that applies to sexually or racially hostile work environment claims.”

Cutler offers employers a fresh opportunity to review their anti-harassment and anti-discrimination policies, and to make sure that employees understand that derogatory jokes in the workplace, including those concerning one’s religion, will not be tolerated. Training is essential. Make sure your employees know your policies and know how to make complaints in accordance with an effective complaint procedure. Supervisors should also know what to do when confronted by a complaint. Religious harassment is no joke. ■

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New York Enacts “Broadcast Employees Freedom to Work Act”

On August 6, New York Governor David A. Paterson signed the “Broadcast Employees Freedom to Work Act,” a new law that prohibits broadcast employers in New York

from requiring certain broadcast employees to sign covenants not to compete as a condition of employment. As written, the new law places significant restrictions on the ability of employers in the broadcast community to negotiate post-employment non-compete terms as part of any employment agreement.

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When does the law take effect?

By its terms, the law takes effect immediately. It is unclear whether the new law applies to contracts in force before August 6, 2008.

What exactly does the law restrict?

The law provides that affected employers shall not require as a condition of employment, whether in an employment agreement or otherwise, that a broadcast employee or prospective broadcast employee refrain from obtaining employment . . . (a) in any specified geographic area; (b) for a specific period of time; or (c) with any particular employer or in any particular industry. The law applies only to post-employment non-compete agreements and not to restrictions on competition during the employment relationship.

What employers are affected by this new law?

The law applies to “broadcasting industry employers. The law defines a “broadcasting industry employer” to include television, radio, and cable stations or networks, internet, or satellite-based services similar to broadcast stations, or any other entity that provides broadcasting services such as news, weather, traffic, sports, educational, or entertainment reports or programming.

What employees are affected?

Affected employees are broadly defined to mean “any on-air employee or off-air employee of a broadcasting industry employer, excluding management employees.” The law does not define who are “management employees” and therefore exempt from the statute. By its terms, however, the law seems to apply to **all** employees who do not fit within the undefined “management” exclusion.

The law also does not indicate whether it applies to independent contractors or to employees of New York broadcast companies who work in other states.

Can an employee voluntarily waive his or her rights under this new law?

No. the statute provides that the protections afforded employees under the law may not be waived and that any agreement intended to waive the prohibitions of the law shall be “null and void and may not be enforced against the parties in any court or other jurisdiction.”

Are there any penalties associated with a violation of this new law?

Yes. The law provides for civil penalties and attorneys’ fees to employees whose rights are violated. However, the new law does not explain how damages are to be calculated. ■

New York Enacts The New York State Worker Adjustment and Retraining Notification Act

Governor Patterson just signed into law a mini-WARN statute. This legislation, effective on or about February 1, 2009, applies to New York employers who employ 50 or more “full-time” employees and requires at least 90 days’ (as opposed to 60 days under the federal WARN) advance written notice of mass layoffs, relocations, and plant closings.

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When is the new law triggered?

The New York plant closing statute is broader than the federal WARN statute/ Under federal law, 50 full-time employees for a plant closing, or 50 full-time employees who constitute at least 33% of the workforce for a mass layoff, must suffer an employment loss to trigger an advance written notice obligation. However, the new legislation mandates that an employer provide notice if: the mass layoff impacts 25 full-time employees who represent at least 33% of the workforce; or the plant closing results in 25 employees losing their positions over a 30-day period.

How much notice is required?

State law imposes a 90-day advance written notice requirement in the event of an employ-

er's relocation of all or substantially all of its operations to a location at least fifty miles from the current location.

What are the penalties?

The law stiffens penalties for employers violating the notification requirements by creating a \$500 a day penalty for violations.

As you can see, the state law is more stringent than federal law and extends the notification time by at least 30 days when 25 or more jobs are at stake, giving affected employees more time to get their finances in order, explore health care options, find another source of income or begin training for future employment. ■

Bressler Defeats Wrongful Discharge Claim after Six Day Jury Trial

A Middlesex County jury took only 26 minutes to decide that Robert Wood Johnson University Hospital did not harass or constructively discharge an employee in retaliation for making complaints. The Hospital was facing a suit filed by former nurse Renee

Stavenik. The unanimous 8 person jury found that Stavenik did not suffer a single adverse employment action, and obviously agreed that she voluntarily resigned. The Hospital was represented by Jed Marcus, chair of Bressler's Labor and Employment Law Group. ■

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