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## EMPLOYMENT LAW

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### Plaintiffs in Glass Houses Cannot Claim Discrimination

Police officer who joined in racial and ethnic slurs could not claim a hostile work environment

The New Jersey Appellate Division recently rejected a lawsuit brought under the New Jersey Law Against Discrimination (NJLAD) by a Jewish police officer who claimed that he was subjected to a hostile work environment because of his Jewish religion. Proving that “he that lives by the sword dies by the sword,” the court observed that the anti-Semitic insults and pranks directed against the officer were sporadic and infrequent, and were part of a work environment in which officers and some supervisors, including the plaintiff, participated in pranks and jokes, often at the expense of various ethnic, racial and religious groups. *Cutler v. Dorn*, 390 N.J. Super. 238 (2007).

In *Cutler*, a Jewish police officer filed a NJLAD claim alleging that the defendants created, perpetuated, and failed to remediate a hostile work envi-

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ronment 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 made several other allegations that, among other things, in 1996, someone placed an Israeli flag in his locker, 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. The Appellate Division reversed the trial court’s denial of Haddonfield’s n.o.v. motion.

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.

Of particular importance to this case was the court’s observation that harassment cases require “careful consideration of the social context in which particular behavior occurs and is experienced by its target.” Under normal circumstances, for example, a football coach who smacks his players on the buttocks as they head on to the field is not liable for harassment; whereas the individual might be liable for harassment if he smacked his secretary’s buttocks in his office. “The real social impact of workplace behavior often depends on the constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”

Considering the plaintiff’s claims against the backdrop of plaintiff’s actual working environment, the court 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 “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 *Cutler* decision was correctly decided; the insults and pranks were sporadic and given the context, entirely welcomed, and nonoffensive. Besides, those who make fun of other racial, ethnic or religious groups should not be allowed to sue when they in turn are offended. It does seem, however, that in interpreting the NJLAD, our courts have created a double standard, applying the NJLAD in different ways to different racial and ethnic groups. In *Taylor v. Metzger*, 152 N.J. 490 (1998), for example, 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. According to the Court, different racial groups react dif-

ferently to racial slurs; therefore, the victim's race must shape the objective inquiry into whether an environment is unlawfully hostile.

One year later, in *Heitzman v. Monmouth County*, 321 N.J. Super. 133 (1999), 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.

The result in *Cutler* was correct, but to get to the right result, the court struggled to distinguish itself from *Taylor* and *Heitzman*, and one can always find factual differences in any two cases. But threading the needle misses the point; the court's decision wrongly perpetuates a flawed analytical model that treats workers differently depending on their race or religion. The *Cutler* court referred to "the potency of racial slurs" as a distinguishing feature between its facts and the facts in *Taylor*. The qualitative distinctions drawn by *Cutler*, *Taylor* and *Heitzman* on the impact or potency

of epithets and insults on different racial and ethnic groups can not be rationally supported.

To be sure, the *Taylor* Court based its conclusions regarding the distinctive characteristics of different ethnic groups on several law review articles, but a close reading of those articles show that they simply do not support the *Taylor* court's findings. See Mari Matsuda, "Public Responses to Racist Speech: Considering the Victim's Story," 87 Mich. L. Rev. 2320 (1989); Richard Delgado, "Campus Antiracism Rules: Constitutional Narratives in Collision," 85 NW. U.L. Rev. 343 (1991); and Charles Lawrence, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 1990 Duke L.J. 431 (1990). The courts are simply in no position to conclude, as they have, that a single racial epithet directed against an African American creates a hostile work environment, whereas multiple anti-Semitic slurs directed against Jews do not.

*Cutler* and *Heitzman* represent the way in which hostile environment cases should be decided, using an objective, principled approach, equally applicable to all workers and employers. The *Taylor* court got it wrong, turning the NJLAD into a non-neutral, value-laden law that is applied in different ways to different racial and ethnic groups. ■