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## Employment & Immigration Law

### State Supreme Court Refocuses Harassment Tests

Remind employers to continually review employee policies

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This summer, the Supreme Court of New Jersey issued two decisions further explaining certain requirements to establish a claim of hostile environment under the New Jersey Law Against Discrimination (LAD). In *Cutler v. Dorn*, 955 A.2d 917 (2008), the Court addressed religion-based hostile work environment claims. In overruling, in part, previous opinions addressing religion-based hostile work environment claims, the Court held that the requirements for demonstrating a religion-based hostile work environment cannot be more stringent than the requirements for demonstrating a sex-based or race-based hostile work environment claim.

Then, in *Godfrey v. Princeton Theological Seminary*, 196 N.J. 178 (2008), the Court addressed the severe-or-pervasive prong of the test to demonstrate a hostile environment claim based on sexual harassment. The Court held that socially inapt or annoying conduct, without more, is not enough to satisfy the severe-or-pervasive prong of the test to determine a hostile environment. As discussed in more detail below, employers may expect an increase in religion-based hostile work environment claims based upon the Court's decision in

*Cutler*. Furthermore, both decisions should serve as a reminder to employers to stress the importance of workplace training for all employees to prevent hostile work environment claims.

#### Godfrey v. Princeton Theological Seminary

The Court in *Godfrey* addressed whether the plaintiffs had met the severe-or-pervasive-conduct prong to demonstrate a hostile environment caused by sexual harassment. The plaintiffs were two women enrolled at the Princeton Theological Seminary who claimed that they were socially harassed by an elderly tenant of the Seminary, William Miller. During their enrollment at the Seminary, both plaintiffs had several encounters with Miller over the span of two to three years. During that time, Miller asked one of the plaintiffs to go to concerts with him; sent her a holiday package containing Winnie the Pooh note cards, and left several telephone messages asking her to go to church service and on a lunch date with him. As to the other plaintiff, Miller sent her a greeting card with his picture on it, told her that he attended chapel service because Miller knew she was going to be in attendance, and sent her an e-mail, while she was studying in England, asking her to meet him in London to attend a lecture and go out to dinner.

After not being satisfied with the Seminary's response to their complaints about Miller, the plaintiffs subsequently

filed a complaint in the Law Division alleging violations of the LAD. After the close of the plaintiffs' case, the trial court granted the Seminary's motion for involuntary dismissal, holding that the plaintiffs failed to demonstrate sexual harassment, or establish any sexual comments or suggestions. The plaintiffs appealed, and a split panel of the Appellate Division affirmed the trial court's decision. Because the Appellate Division's decision was by a split panel, the plaintiffs subsequently appealed the Appellate Division's ruling to the Supreme Court of New Jersey as a matter of right.

The Court began its analysis by reiterating the standards of proof that are necessary to demonstrate a discriminatory sex-based hostile environment: "a plaintiff must show that 'the complained-of conduct (1) 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.'" (Quoting *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 603-04 (1993)). Whether conduct is "severe or pervasive" requires an assessment of the totality of the relevant circumstances, which includes an examination of: (1) the frequency of the discriminatory conduct; (2) the "severity" of the conduct; (3) whether the conduct is "physically threatening or humiliating, or a mere offensive utterance;" and (4) whether the conduct interferes with the employee's work performance. (quoting *Green v. Jersey City Bd. of Educ.*, 177 N.J.

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434, 447 (2003); *Taylor v. Metzger*, 152 N.J. 490, 506 (1998)).

The Court concentrated on the severe or pervasive prong and stated that “the cumulative effect of the various incidents’ must be considered.” The Court explained that it is insufficient to assess the incidents individually and that the harassing conduct itself must be evaluated, not the conduct’s effect on the particular plaintiff. The Court, therefore, utilizes the reasonable-person standard in assessing whether conduct constitutes a hostile work environment. Consequently, a plaintiff’s “subjective responses to the allegedly harassing conduct do not control, or otherwise affect, the determination of whether the conduct is severe or pervasive, which requires application of the reasonable-woman standard.”

In applying the objectively reasonable standard, the Court agreed with the trial court and the majority in the Appellate Division that those courts correctly regarded the totality of plaintiffs’ evidence of falling short of the severe and pervasive conduct necessary to constitute sexual harassment. In affirming, the Court explained that socially inapt or annoying behavior does not, without more, constitute a hostile work environment. “Persons who are socially tone deaf are not, by that characteristic, necessarily the equivalent of sexual harassers.” Importantly, the Court further noted that neither plaintiff in the case made any statement to Miller that they considered his comments and actions to be inappropriate. As such, a LAD plaintiff “cannot replace [his or her] own obligation to simply tell [another] that they had no interest in him [or her] romantically or even as a casual acquaintance. To allow the LAD to replace such basic human interaction trivializes the purpose for which the LAD was established.”

In an effort to bolster their claims that Miller’s conduct was severe or pervasive, the plaintiffs argued that the Seminary was aware of past interactions of other students with Miller and failed to take corrective action. “The means employed by an institution to deter harassment, and the enforcement of those means, may be considered when assessing that institution’s vicarious liability for the actions of an individual over whom the institution exercises control.” An employer who exercises due care to prevent

a hostile work environment will be shielded from vicarious liability for discriminatory conduct that occurs in the workplace.

The Court explained that, in addition to considering whether an employer has measures to prevent a hostile work environment, courts will also look to the adequacy of an employer’s response to prior reported incidents of harassment. “An institution’s past experiences, which highlight flaws in the preventative measures employed, and a failure to adjust adequately to improve deterrence based on that experience, can provide relevant and weighty evidence in a due-care analysis.” The Court explained, however, that the admissibility rational applicable to the vicarious liability element of a LAD claim against an institution is not to morph into the severe-or-pervasive analysis. Accordingly, in order for a plaintiff to satisfy the severe-or-pervasive element of a hostile work environment claim, the plaintiff must present “evidence of bad conduct of which she has firsthand knowledge.” The Court determined that because the plaintiffs had no direct knowledge of Miller’s earlier conduct, it could not be used to strengthen their claims of a severe or pervasive hostile environment.

### **Cutler v. Dorn**

The issue before the Court in *Cutler v. Dorn* was whether the threshold for demonstrating a religion-based, discriminatory hostile work environment claim is more stringent than the threshold applicable to claims of sexually or racially hostile work environment claims. In a reported decision, the Appellate Division, relying upon *Heitzman v. Monmouth County*, 321 N.J. Super. 133 (App. Div. 1999), held that the alleged discriminatory conduct was too sporadic and not sufficiently severe or pervasive to create a religion-based hostile work environment. The Supreme Court of New Jersey granted the plaintiff’s petition for certification.

The Court reversed the Appellate Division and held 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.” The

Court explained that the test espoused in *Lehmann, supra*, applies generally to all hostile work environment claims. Where a hostile work environment claim involves allegations based on religious faith or ancestry, the inquiry is whether a reasonable person of the plaintiff’s religion or ancestry would consider the acts or comments to be sufficiently severe or pervasive to alter the conditions of employment and create a hostile working environment. The Court explained that “[a]ntagonistic, degrading, or demeaning conduct in the workplace that is directed at or about one’s religious faith, or ancestry, can be discriminatory and can amount to an unlawful hostile environment.”

The Court made note that it is important that the lower courts in New Jersey recognize that religion-based harassing conduct is just as offensive as other forms of harassing conduct, including sexual harassment. The Court, therefore, determined that a plaintiff who asserts harassment on the basis of his or her religious beliefs and ancestry “is not required to bear a heavier burden in order to place his hostile work environment claim before a jury.” As a result, “a prima facie case for a religion-based hostile work environment claim can arise from the corrosive effect that religion taunts, belittling derogatory comments, and insults about one’s religious beliefs and ancestry can have when made in the workplace.” The *Cutler* Court made clear that to the extent the holding in *Heitzman* was perceived to suggest a higher threshold for demonstrating a religion-based hostile work environment, “then that misapprehension must end.”

### **Effects of Decisions**

As a result of the Supreme Court’s recent decision in *Cutler*, employers may expect to see an increase in claims alleging a hostile work environment. Employers, however, should be reminded of the continuing need to review and improve measures to prevent hostile work environment allegations. In addition to preventing such allegations, in the event that such a claim is made, sufficient preventative measures may work to shield employers from vicarious liability for discriminatory conduct that occurs in the workplace. ■