HOW THE NEW JERSEY SUPREME COURT SET A NEW PRECEDENT WITH RESPECT TO RELIGION-BASED HOSTILE WORK ENVIRONMENT CLAIMS WITH ITS HOLDING IN *CUTLER v. DORN*

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I. INTRODUCTION

In *Cutler v. Dorn*,[1] the New Jersey Supreme Court unanimously held that Jason Cutler, an officer with the Haddonfield Police Department, had proved that his rights under the state's Law Against Discrimination ("LAD") had been violated by his superiors and co-workers.[2] The opinion, delivered by Justice LaVecchia, set the standard upon which all religion-based workplace discrimination cases, brought under LAD, would be measured.[3]

The LAD was enacted by the New Jersey Supreme Court to "protect not only the civil rights of individual aggrieved employees but also to protect the public's strong interest in a discrimination-free workplace."[4] In fact, "the New Jersey Legislature mandated that the LAD be liberally construed in combination with

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[1] *Cutler v. Dorn*, 196 N.J. 419 (2008).

[2] N.J. STAT. ANN. § 10:5-12(a). (noting that the LAD, as used in this section makes "it unlawful for an employer, because of the race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, sex of any individual…to discriminate against such individual in compensation or in terms, conditions or privileges of employment.").

[3] *Cutler*, 196 N.J. at 420. The borough of Haddonfield is located in Camden County, New Jersey with a population of 11,659 (as of 2000) for which 7.07% are Jewish. *See* http://www.fizber.com/sale-by-owner-home-services/new-jersey-city-haddonfield-profile.html? more=neigh. *See also*, http://www.haddonfieldnj.org/.

[4] *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 600 (1993); *see also Fuchilla v. Layman,* 109 N.J. 319, 334, *cert. denied, 488 U.S. 826, 109 S. Ct. 75, 102 L. Ed. 2d 51 (1988).*

other protections available under New Jersey state law to afford victims maximum protection from workplace discrimination."[5]

Not only is the LAD one of "the oldest and most progressive anti-discrimination laws," but it is also one of the strictest.[6] For example, although the LAD is almost identical to Title VII in many ways, it expands the notion of discrimination and provides much broader protections against discrimination. Specifically, LAD expands on Title VII by providing individual liability against employers and expanding on the number of protected classes that may bring a discrimination claim.

What makes *Cutler* unique is that it signifies the first time that the New Jersey Supreme Court addressed the topic of religion-based discrimination in the context of a hostile work environment. Furthermore, the Court applied the same analysis, as it would have if Cutler's discrimination claim were based on sex or race. For that reason, this Note discusses three main topics: (i) what standard did the Court reach; (ii) why the Court reached that particular standard; and (iii) how the Court applied that standard to the case at hand. [7]

II. BACKGROUND

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[5] Lisa M. Candera, *Aiding And Abetting Liability Under The New Jersey Law Against Discrimination: What's The Appropriate Standard For Imposing Individual Liability?*, 35 RUTGERS L.J. 1139, 1141 (2004). Listing the plethora of harms caused by workplace discrimination, the New Jersey Legislature stated:

> [P]eople suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act.

N.J. STAT. ANN. § 10:5-3 (West 2002).

[6] Candera, *supra* note 5, at 1141.

[7] *Cutler*, 196 N.J. at 420.

The Plaintiff in this action, Corporal Jason Cutler, graduated from the New Jersey State Police Academy in 1995. Upon graduation, he accepted a job as a police officer with the Haddonfield Police Department. There, Cutler faced a tremendous amount of harassment from his co-workers and supervisors regarding his Jewish ancestry. [8]

One instance occurred when an unnamed superior officer ordered Cutler to remove a yarmulke which he wore in honor of Passover. Although Cutler complied, he later observed that another member of the police department was permitted to wear a "Jesus First" pin on his uniform. [9]

Further, Cutler's supervisor, Lieutenant Lawrence Corson, often made comments which reinforced negative Jewish stereotypes. For example, in a conversation discussing finances, Corson directed the statement, "Jews are good with money," toward Cutler.[10] Cutler argued that the comment was intended to degrade his religious ancestry and reinforce a well known negative stereotype.[11]

Similarly, the Chief of Police, Bill Ostrander, is alleged to have made negative comments in reference to Cutler's Jewish ancestry several times a month. However, Ostrander's comments, in comparison to Corson's, were both more frequent and malicious. For instance, Ostrander once asked Cutler: "where [his] big Jew…nose was."[12] In addition, Ostrander unconditionally referred to Cutler as "the Jew."[13]

Unfortunately, since this attitude was manifested by Cutler's superior officers, the comments had a ripple effect throughout the whole department. In other words,

[8] *Id.* at 425. The New Jersey State Police Academy is located in Sea Girt, New Jersey, and training consists of approximately 25 weeks. *See* http://www.state.nj.us/njsp/recruit/academy.html (last visited Jan. 21, 2009).
[9] *Id.* at 428.
[10] *Id.* at 426.
[11] *Id.*
[12] *Id.* at 427. (noting that Corson made stereotypical comments about Cutler's religion ancestry in the vicinity of co-workers "a couple of times a month.").
[13] *Id.* at 428.

Cutler's co-workers interpreted his supervisor's comments as condoning this type of behavior. Accordingly, they began to tease him as well.

One instance occurred when an anonymous co-worker placed a sticker of an Israeli flag on Cutler's locker. This act was originally viewed as a non-issue; however, several days later, someone placed a sticker of a German flag directly above the Israeli flag. Cutler interpreted this vandalism as a symbol of genocide, and thus, began to suffer from anxiety which physically manifested itself. Specifically, Cutler began to experience anxiety, insomnia and severe headaches.[14]

Up to this point, Cutler hesitated to file a complaint as he feared that taking this action would create a hindrance to his future with the Haddonfield Police Department. However, on April 18, 1999, Officer Robert Shreve Jr., annoyed that he was assigned to patrol a Jewish festival on a Saturday, suggested to a number of members of the police force, "let's get rid of all those dirty Jews."[15]

Cutler then confronted Shreve and expressed his disgust at the mere utterance of this proposal. Shreve responded by assuring Cutler that the suggestion, "let's get rid of all those dirty Jews," was made in jest and it should be interpreted as a bad attempt at humor. Cutler gave Shreve the benefit of the doubt and regarded the comment as directed by Shreve.[16]

However, several months later, both Shreve and Cutler were at an unrelated hearing. As a result, Shreve was asked a question regarding the incident and

[14] *Id.*
[15] *Id.* at 427. Robert Shreve Jr. is a fellow police officer, named in Cutler's initial lawsuit, but later removed because he was the same rank as Cutler, thus, not considered a supervisor. In addition, Cutler explained that because Haddonfield has a small police department with limited prospects for promotion, he feared that complaining about his superior officers would cripple his opportunities for advancement. *Id.* at 429.
[16] *Id.*

repeated his atrocious suggestion. Hearing Shreve repeat his comment, in Cutler's words, served as "the straw to break the camel's back."[17]

Accordingly, on July 14, 1999, Cutler filed a hostile work environment claim under LAD against the Borough of Haddonfield, Theodore Dorn, and Robert Shreve Jr.[18] In his complaint, Cutler argued, most notably, that the above facts, if taken under the totality of the circumstances threshold, constituted a prima facie case of religious discrimination.[19]

In defense, the Haddonfield Police Department did not deny that it participated in this behavior. Rather, they argued that, "[w]hile the comment was undoubtedly disturbing, it was isolated, not specifically directed at plaintiff, and not made by a supervisor." Accordingly, Haddonfield introduced a "humor file" to show that the conduct about which Cutler complained was of the same degree and type as the conduct in which most of the Haddonfield police officers, including Cutler, regularly engaged.[20]

The humor file contained insensitive characterizations, outlandish drawings and caricatures involving persons within the department. The humor file supposedly demonstrated the level of "ribbing" and "breaking of chops" that went on among the members of the department. Further, the humor file was presented in Court to establish the inoffensive context in which the "Jew" comments were to be taken.[21]

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[17] *Id.*

[18] *Id.* at 426. ("Where a hostile work environment claim involves allegations of harassment based on religious faith or ancestry, the inquiry is whether a reasonable person of the plaintiff's religion or ancestry would consider the . . . comments made . . . to be sufficiently severe or pervasive to . . . create a hostile working environment.") *Id.* at 423.

[19] *Cutler*, 196 N.J. at 419. ("In order to place a hostile work environment claim before a jury, a claimant asserting harassment on the basis of religious beliefs and ancestry is not required to bear a heavier burden than claimants asserting sexual or racial harassment.")

[20] *Id.* at 426. The humor files consisted of two file folders which included in them, among other things, collections of characterizations, dirty jokes, sexual images, and cut-and-pasted pictures. This file included a document depicting an individual, in a Nazi uniform, giving a Nazi salute alongside a barbeque oven on which appeared the faces of two officers. *Id.*

[21] *Id.* Haddonfield Police Department argued that this conduct was welcomed by Cutler and when Cutler was asked about the Humor File, he stated that he "believe[d] the Humor File and the comments were all part of a [sic] atmosphere in the Department for you guys to relieve tension, make the place a more happier [sic], fun, humorous place," Cutler responded in the affirmative.

Nevertheless, the trial court rejected Haddonfield's justifications and ruled that even if the humor would be considered a norm, Cutler's hostile work environment claim is still valid. Ironically however, Cutler was awarded no damages on the analysis that he failed to show that offensive conduct was severe or pervasive enough to that a reasonable follower of Judaism would consider the working conditions as being hostile. The trial court further noted that the borough's police department "is relatively small and had been populated by an 'in-group' of officers and some supervisors who delighted in playing pranks, teasing, ribbing and 'breaking each other's chops,' and Cutler had participated to at least some extent." As a result, Cutler appealed.[22]

On appeal, the Appellate Division sided with the Defendants. Although the Court considered the "totality of the circumstances," it held that neither that the comments nor the anti-Jewish events, subjected Cutler to a hostile work environment and stated: "[n]ot every offensive utterance will give rise to a hostile work environment."[23] The Court's rationale was that the comments were not intentionally made to be hostile; rather, they were made in the nature of joking or teasing. Consequently, the Court of Appeals reversed the jury's finding and held that Cutler was not subject to a hostile work environment. As a result, Cutler filed an appeal to the New Jersey Supreme Court and the high Court agreed to hear the case.[24]

III. THE NEW JERSEY SUPREME COURT

After this case was decided on both the trial level and appeal level, the New Jersey Supreme Court was given the chance to sort through the evidence and make a ruling on this case. Specifically, the New Jersey Supreme Court would directly address whether the complained of behavior constituted unlawful

Id. at 429.

[22] *Id*. at 423. ("After a trial, the jury found that Cutler was subjected to a hostile work environment and that Haddonfield was liable. The jury awarded no damages, however, and, further, found that the delay in Cutler's promotion was not retaliatory.").

[23] *Id.*

[24] *Id.* at 431.

discrimination. In doing so, the Court set a threshold to which all workplace discrimination cases, based on religion, were to be measured against in the state of New Jersey.

Accordingly, the Court first had to establish an appropriate threshold to measure Cutler's claims in the context of a hostile work environment. As a result, the Court leaned on the state's strong policy interest in maintaining a discrimination-free workplace.[25] In doing so, the Court applied the same rationale as it used to decide *Lehmann v. Toys 'R' Us, Inc*.[26] The Court cited *Lehmann* to set forth the standard for which a hostile work environment claim based on sex would be measured against:

> [a] plaintiff, claiming a hostile workplace based on acts of sexual harassment, must prove 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.[27]

As a result, for the first time, the Court effectively ruled that it would analyze discrimination based on religion, under the same strict scrutiny standard as

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[25] *Id.* at 439.

[26] *Lehmann*, 132 N.J. at 592. ("A plaintiff states a cause of action for hostile work environment sexual harassment when he or she alleges discriminatory conduct that a reasonable person of the same sex in the plaintiff's position would consider sufficiently severe or pervasive to alter the conditions of employment and to create an intimidating, hostile, or offensive working environment."); *see also Id.* at 592 (noting that "[t]he Legislature enacted the remedial New Jersey Law Against Discrimination (LAD), N.J.S.A. §§ 10:5-1 to -49 (2008), to provide an effective means to root out the cancer of discrimination").

[27] *Cutler*, 196 N.J. at 428-29. (noting that despite the fact that *Lehmann* "involved sexual harassment in the workplace, *Lehmann's* test generally applies to hostile work environment claims."); *see Id.* at 430-31 (Defining "severe or pervasive" as: "conduct that would make a reasonable person believe . . . the working environment is hostile" and further notes that "severe or pervasive" conduct is established by citing "numerous incidents that, if considered individually, would be sufficiently severe").

discrimination based on gender or race. Thus, in order for Cutler to win on his claims, he would have to show a prima facie case of religious discrimination.[28]

A prima facie case for a religion-based hostile work environment claim can arise from the corrosive effect that religious taunts, belittling derogatory comments, and insults about one's religious beliefs and ancestry can have, when made in the workplace. Therefore, Cutler had the burden to prove that the complained of behavior, on the part of the Haddonfield Police Department: (i) would not have occurred if Cutler was not of Jewish ancestry; and (ii) was so severe or pervasive that a reasonable follower of Judaism would agree that Cutler was the victim of a hostile work environment.[29]

The Court first addressed whether the complained of behavior was unambiguously directed at Cutler simply because Cutler was of Jewish ancestry. In considering this, the Court asserted that the intention of the Haddonfield Police Department was to negatively impact Cutler. It came to this decision as a result of the continued harassment and the fact that Cutler was the only person of Jewish ancestry at the Department. In sum, the Court affirmatively ruled that the complained of behavior would not have occurred had Cutler not been of Jewish ancestry. Accordingly, the Court deemed the first half of the test as satisfied.[30]

Next, the Court approached the second half of the test. In doing so, the Court followed the same logic as it applied in *Taylor v. Metzger* and viewed the evidence under the totality of the circumstances standard.[31] The Court's rationale

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[28] *Id.* Historically, strict scrutiny was considered the standard for discrimination based on sex or race, while medium level scrutiny was designated for religion and things of that nature. Frederick A. Morton Jr., *Class-based Affirmative Action: Another Illustration of America Denying the Impact of Race*, 45 RUTGERS L. REV. 1089, 1107 (1993).

[29] *Id.*

[30] *Id.*

[31] *Taylor v. Metzger,* 152 N.J. 490 (1998) (holding that there existed a material issue of fact that an American police officer who brought a LAD claim was sufficiently discriminated against to sue for under a hostile work environment theory as the sheriff, his boss, repeatedly uttering racial slurs); *see. Id.* at 497 (finding that although the totality is analyzed, "in certain circumstances, even a single comment can be so severe as to pollute the work environment, rendering it irretrievably hostile."). However, in defense, the Haddonfield Police Department argued that the comments

was that since a discrimination claim is "based on discrete acts of discrimination," and a "hostile [work] environment claims are based on the cumulative effect of the individual acts," then rather than measuring each individual act of discrimination, the Court measured all discriminatory or harassing conduct as a whole.[32]

Next, the Court defined the context for which the "reasonable person" standard would apply. In doing so, the Court considered the extensive history of oppression that the Jews have had to overcome. Accordingly, the Court stated that the oppressive actions on the part of the Haddonfield Police Department "harkened Cutler back to thoughts of one of the lowest times in mankind's history, the Holocaust."[33] With this in mind, the Court held that the standard that would be applied would be the reasonable person of Jewish ancestry.[34]

Accordingly, the Court applied this new standard to the case. In doing so, the Court noted that a reasonable member of the Jewish religion would easily categorize a work environment which harps on the negative stereotypes of their religion as hostile. Thus, in considering the acidic effect of the religious taunts in conjunction with the insulting behavior which Cutler was exposed to because of his religious ancestry, the Court held that Cutler was subject to a hostile work environment as defined by the New Jersey LAD.[35]

With this decision, the Supreme Court effectively overruled the Appellate Division's ruling and sided with the trial court. In their closing remarks the

were not comparable to the comments made in *Taylor v. Metzger*. Cutler responded by arguing that this ruling undercuts *Taylor* and runs counter to the LAD's "goal of eradicating the cancer of discrimination." *Id*. at 499.

[32] *Cutler*, 196 N.J. at 430. Thus, "severe or pervasive" conduct must be conduct that would "make a reasonable [person] believe that the conditions of employment are altered and [that the] working environment is hostile." Making that assessment requires an examination of the totality of the circumstances. *But see Id.* at 432 (finding that "[h]ostile work environment claims are different from claims based on discrete acts of discrimination.").

[33] *Id.* at 434. ("The unique history and background of Cutler's Jewish faith and ancestry provide the contextual setting for our consideration of the totality of the evidence marshaled by Cutler in support of his hostile work environment claim.").

[34] *Id.* at 436.

[35] *Id.*

Supreme Court explained that the Appellate division incorrectly based its holding on *Heitzman v. Monmouth County*, a similar case.[36]

The Court noted that this case differed from *Heitzman* for three main reasons. First, because the derogatory comments in the *Cutler* case were made by both supervisors and peers, rather than only peers as it was in *Heitzman*.[37] Second, in *Cutler,* the comments were directly aimed at the plaintiff, whereas in *Heitzman*, the comments were not aimed at an individual. Third, and most importantly, the Supreme Court overruled the Appellate Division because, as it stated: "if the holding in *Heitzman* is perceived, in application, to suggest a different, and higher, threshold for demonstrating a hostile work environment when religion-based harassment is claimed, then that misapprehension must end."[38]

IV. CONCLUSION

The New Jersey Supreme Court effectively set the precedent for which religion-based discrimination claim under LAD would be measured against by holding that a claimant "does not bear heavier burden in order to place his hostile work environment claim before the jury."[39] Further, the Court effectively decided that "a prima facie case for a religion-based hostile work environment claim can arise from the corrosive effect that religious taunts, belittling derogatory comments, and insults about one's religious beliefs and ancestry can have when made in the workplace."[40]

The Court made an important decision that will affect how future cases of workplace discrimination in New Jersey are managed and that sends a message to employers that they must be far more careful to erase religious-based prejudice from their work environments to protect against suit. Whether the harassment or

[36] *Heitzman v. Monmouth County*, 321 N.J. Super. 133 (1999) (holding that anti-Semitic comments directed towards plaintiff were not so severe or pervasive as to create a hostile work environment).
[37] *Cutler*, 196 N.J. at 438.
[38] *Id.* at 439.
[39] *Id.*
[40] *Id.*

discrimination is based on sex, religion, or race, does not change the fact that harassment or discrimination had occurred, and the New Jersey Supreme Court argued in *Cutler v. Dorn* that there is no tolerance for that in New Jersey.