Garden State CLE:

Understanding the New Jersey Law Against Discrimination Decisions From the Supreme Court

Instructors:

Robert Ramsey, Author

Lesson Plan

Part I
New Jersey Constitution of 1947

Article I, Paragraph 5

No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry, or national origin.

The New Jersey Law against Discrimination
N.J.S.A. 10:5-1 to -50

The New Jersey LAD was enacted in 1945 with the express purpose of ensuring that the civil rights guaranteed by the State Constitution be extended to all its citizens.

In furtherance of its goals, LAD has evolved to encompass various forms of discrimination. The statute was amended in 1972 to prohibit employment discrimination against the physically handicapped and again in 1978 to include disabilities other than physical ones. Consistent with that approach, the Supreme Court has consistently held that the overarching goal of LAD to eliminate the cancer of discrimination is to be achieved through a liberal construction of its provisions.

Public Policy
N.J.S.A. 10:5-3

The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality, are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State; provided, however, that nothing in this expression of policy prevents the making of legitimate distinctions between citizens and aliens when required by federal law or otherwise necessary to promote the national interest.

The Legislature further declares its opposition to such practices of discrimination when directed against any person by reason of the race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, disability or nationality of that person or that person's family members, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and ensured.

The Legislature further finds that because of discrimination, people 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. Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.

Statute of limitations

The LAD contains different procedural requirements. Under the Law, an aggrieved person may either file an administrative complaint with the Director of the Division on Civil Rights or file a civil action in the Superior Court under N.J.S.A. 10:5-13. There is a six-month statute of limitations on administrative action under N.J.S.A. 10:5-18.

There is a two-year statute of limitations claims brought in the Superior Court, Montells vs. Haynes, 133 N.J. 282, 292(1993) subject to the continuing violation rule: When an individual is subject to a continual, cumulative pattern of tortious conduct, the statute of limitations does not begin to run until the wrongful action ceases. Shepherd vs. Hunterdon Developmental Center, 174 N.J. 1(2002).

See also Alexander vs. Seton Hall, 204 N.J. 219(2010) (Age and sex discrimination in pay) - Generally stated, discrete acts of discrimination, such as termination or a punitive retaliatory act are usually readily known when they occur and thus easily identified in respect of timing. However, when the complained-of conduct constitutes a series of separate acts that collectively constitute one unlawful employment practice, the entire claim may be timely if filed within two years of the date on which the last component act occurred. The New Jersey 90-day Tort claims notice does not apply to LAD complaints against governmental agencies. Fuchilla vs. Layman, 109 N.J. 319(1988).

Hostile Work Environment

The New Jersey Supreme Court has considered LAD claims alleging hostile work environment based upon a number of factors, including:

Racial Animus
Spencer vs. Bristol-Meyers, 156 N.J. 455(1998)

Religion & Ancestry

Gender

Age in Employment & Hiring
Nini vs. Mercer County Community College, 202 N.J. 98(2010)

Disability
Raspa vs. Gloucester County Sheriff, 191 N.J. 323(2007)

The basic standard for determining whether acts of harassment in the workplace constitute invidious discrimination in violation of the LAD is set forth under a 4-part test. By way of example, when a black plaintiff alleges racial harassment under the LAD, he must demonstrate that the defendant's complained-of conduct:

(1) Would not have occurred but for the employee's race;

(2) It was severe or pervasive; (contrast Godfrey vs. Princeton Theological Seminary, 196 N.J. 178(2008) (harassment was neither severe nor pervasive)

(3) Enough to make a reasonable person of that race believe;

(4) That the conditions of employment were altered and the working environment became hostile or abusive.

The test's second, third, and fourth prongs are interdependent. One cannot inquire whether the alleged conduct was 'severe or pervasive' without knowing how severe or pervasive it must be. And the answer to that question lies in the other prongs: the conduct must be severe or pervasive enough to make a reasonable person of that race believe that the conditions of employment had been altered and the working environment had become hostile.

The seminal decision establishing the law on these issues comes from Lehmann vs. Toys 'R' Us, 132 N.J. 587(1993), a case involving pervasive sexual harassment directed at a female employee coupled with deliberate indifference to the misconduct by management.

Lehmann vs. Toys 'R' Us, 132 N.J. 587, 592(1993)
Gender/Sexual Harassment

What are the standards for stating a cause of action for hostile work environment sex discrimination claims and what is the scope of an employer's liability for a supervisor's sexual harassment that results in creating a hostile environment?

Facts: In or around December 1986, plaintiff began to notice what she considered offensive sexual comments and touching from her immediate supervisor, Baylous, directed at other female employees. Plaintiff witnessed Baylous walk up behind a female employee at the company Christmas party and put his hands on her. The female employee evidently found his touching offensive because she told him loudly and in angry terms to get his hands off her. The record is replete with other instances of Lehmann witnessing Baylous touch and grab other female employees, although the chronology of those events is somewhat unclear.

The first incident directly involving Lehmann occurred in January 1987. Lehmann testified that Baylous directed her to reject a 300–page purchase order and to tell the employee to rewrite it, and that she replied that the employee would be very angry. Lehmann testified that Baylous told her to "just lean over his desk and show him your tits, implying that that way Frank couldn't get upset at me." Lehmann testified that Baylous had, at various times, directed her to "stick your tits out at" a new boss, and to "write a memo to cover your ass because you have such a cute little ass."

On another occasion in January 1987, Lehmann was in Baylous's office with him. She testified that:

> Don stood up and walked around his desk and stood by the door. I rose and went to my right a little, and I noticed something out of the corner of my eye out of the window, and I said, what's going on out there? At this Don lifted the back of my shirt up over my shoulders. I know my bra strap was exposed, and said, give them a show. And I pulled my shirt down, ran out of the office crying.

Over time, the plaintiff's complaints of ongoing sexual harassment and hostile work environment were largely ignored by mid-level and top management officials. Plaintiff subsequently resigned.

The Court held that 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.

The Justices further held that in the determination of an employer's liability for damages, when an employee raises a hostile work environment discrimination claim against a supervisor:

> (1) The employer will be strictly liable for equitable damages and relief;
>
> (2) The employer may be vicariously liable under agency principles for compensatory damages that exceed equitable relief; and
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> (3) The employer will not be liable for punitive damages unless the harassment was authorized, participated in, or ratified by the employer.

Taylor vs. Metzger, 152 N.J. 490(1998)
Racial Animus

In 1972, plaintiff Carrie Taylor began working as a sheriff's officer in the office of the Burlington County Sheriff. On January 31, 1992, Taylor, who is African American, was at the Burlington County Police Academy for firearms training and weapons qualification. While there, she encountered defendant Henry Metzger and Undersheriff Gerald Isham. Taylor said hello, and, in response, Metzger turned to Isham and stated: "There's the jungle bunny." Isham laughed. Plaintiff believed the remark to be a demeaning and derogatory racial slur, but she did not reply. She became a "nervous wreck," immediately began crying, and went to the bathroom. Taylor subsequently returned to the Police Academy classroom, in which she was the only African American and the only woman. Holding back tears, she related her experience to co-workers. The officers laughed; one responded: "I'm a black Irishman." This comment further offended plaintiff, who felt their reactions were insensitive.

Here, the basic issue of law is whether the single remark uttered by defendant was, from the perspective of a reasonable African American, sufficiently severe to have produced a hostile work environment. Because this case was determined by summary judgment, the key question and more pointed inquiry is whether a rational fact finder could reasonably determine on the basis of plaintiff's evidence that the racial insult directed at her by the sheriff in the presence of the undersheriff was, under the surrounding circumstances, sufficiently severe to have created a hostile work environment.

In this case, defendant's remark had an unambiguously demeaning racial message that a rational fact finder could conclude was sufficiently severe to contribute materially to the creation of a hostile work environment.

Cutler vs. Dorn, 196 N.J. 419(2008)
Religion & Ancestry

Plaintiff Cutler had been employed as a police officer by Haddonfield since his graduation from the Police Academy in 1995. During the period of time before he was promoted to corporal, Cutler, who is Jewish and whose faith and background were known by those with whom he worked, observed that his supervisors would make negative and demeaning comments, or alleged "jokes," about "Jews" while in his presence. As an example, Cutler pointed to the conduct of the then-Chief of Police, Bill Ostrander, who commented on Cutler's Jewish ancestry "a couple times a month." Ostrander often referred to Cutler as "the Jew" when Cutler was present. On one occasion that was memorable to Cutler, Ostrander asked Cutler "where [his] big Jew ... nose was," apparently referencing the fact that Cutler's nose was smallish. According to Cutler, Lieutenant Lawrence Corson also made comments about persons of Jewish faith. Corson would work into his conversations with Cutler such comments as "Jews are good with numbers," "why didn't you go into your family business ... why are you here," and "Jews make all the money."

Consistent 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 workplace environment claims. Therefore, and also consistent with our holdings on hostile workplace claims in those settings, we conclude that plaintiff's case satisfied the standards for a hostile work environment claim to warrant, and subsequently uphold, a jury determination.

Meade vs. Township of Livingston, ___ N.J. ___ (2021)
Gender-Based Employment Discrimination
Burden-Shifting of the Proofs at Trial

To analyze employment discrimination claims brought under the LAD, New Jersey has adopted a procedural burden-shifting methodology.

Under the burden-shifting analysis,

> (1) The plaintiff must come forward with sufficient evidence to constitute a prima facie case of discrimination;
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> (2) The defendant must then show a legitimate non-discriminatory reason for its decision; and
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> (3) The plaintiff must then be given the opportunity to show that defendant's stated reason was merely a pretext or discriminatory in its application.

Thus, it is thus the plaintiff who bears the burden to establish a prima facie discrimination claim. To establish a prima facie case of gender discrimination, a plaintiff must show that she:

> (1) Was in a protected group;
>
> (2) Was performing a job at a level that met the employer's legitimate expectations;
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> (3) The she was nevertheless fired; and
>
> (4) The employer sought someone to perform the same work after the she left.

Significantly, the evidentiary burden at the prima facie stage is rather modest. It is limited to demonstrate to the court that plaintiff's factual scenario is compatible with discriminatory intent, that discrimination could be a reason for the employer's action.

The prima facie case is to be evaluated solely on the basis of the evidence presented by the plaintiff, irrespective of defendants' efforts to dispute that evidence.

All that is necessary is that plaintiff produce evidence showing that she was actually performing the job prior to the termination. That evidence can come from records documenting the plaintiff's longevity in the position at issue or from testimony from plaintiff or others that she had, in fact, been working within the title from which she was terminated.

Once the plaintiff makes that prima facie showing, the burden then shifts to the employer. Indeed, the establishment of a prima facie case gives rise to a presumption that the employer unlawfully discriminated against the employee. When the employer produces evidence of legitimate, nondiscriminatory reasons for the employment action it took, the presumption of unlawful discrimination disappears.

Finally, in the third stage of the burden-shifting scheme, the employee must prove by a preponderance of the evidence that the reason articulated by the employer was merely a pretext for discrimination and not the true reason for the employment decision. Although the burden of production shifts throughout the process, the employee at all phases retains the burden of proof that the adverse employment action was caused by purposeful or intentional discrimination. In meeting that burden, the plaintiff need not prove that gender was the sole or exclusive consideration in the employer's termination decision. Rather, the plaintiff need only show by a preponderance of the evidence that it made a difference in that decision.