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Legal Alerts

Appeals Court Expands New Jersey Law Against Discrimination

Date: 5/7/2012

A recent decision by New Jersey's Appellate Court substantially broadens the scope of the state's Law Against Discrimination (LAD) to permit any employee who is subjected to any discriminatory comments, even if the comments do not relate to that individual's actual protected characteristics, to assert a hostile work environment claim.

The LAD prohibits employers from discriminating on the basis of race, religion, creed, color, ancestry, national origin, sex, age, marital status, domestic partner or civil union status, actual or perceived disability, pregnancy, sexual orientation, gender identity or expression, atypical cellular or blood trait, genetic information, veteran status, liability for service in the Armed Forces of the United States, perceived inclusion in any of the aforementioned protected categories, or the fact that an employee engages in legally protected conduct.

The court decision also provides guidance confirming the steps that an employer can take to avoid liability.

Background

In *Cowher v. Carson & Roberts*, Myron Cowher, a truck driver who is not Jewish, alleged that his supervisors believed he was Jewish, routinely directed explicit and offensive anti-Semitic slurs at him, and used a Hebrew folk song as the ring tone for his calls. The supervisors initially denied making the offensive remarks, but when Cowher produced DVDs of their conduct, they changed their testimony and stated that their comments were jokes and "locker-room type exchanges" in which the plaintiff willingly participated.

The supervisors said they never perceived Cowher to be Jewish, but teased him about being Jewish because he and his wife took a cut of the proceeds of a Super Bowl pool they ran, thereby "conforming to the stereotype of Jews as avaricious." The trial court dismissed the case reasoning that no LAD liability could exist because the plaintiff was not Jewish. The Appellate Division reinstated the lawsuit, finding that the LAD protects individuals who are perceived to be members of a class protected by the LAD.

Significance Of The Case

This case is significant for a number of reasons. First, the case expands the LAD by shifting the focus towards the discriminatory nature of the comments, and away from the characteristics of the employee. An employee need only introduce some facts to show that the harasser perceived the individual to be a member of the protected group. Second, the opinion requires trial courts to determine whether comments are actionable based upon how they would be perceived by a reasonable person in the protected category targeted by the comments, rather than a reasonable person in the "shoes of the plaintiff."

For example, the Appellate Division found that the anti-Semitic comments of Cowher's supervisors would cause a reasonable Jewish listener to "harken...back to thoughts of one of the lowest times in mankind's history, the Holocaust." In the court's view, the fact that Cowher was not Jewish should not excuse the employer from liability.

In addition to announcing new law, the *Cowher* case serves as a cautionary tale to supervisors concerning the impact of technology on lawsuits. In New Jersey, it is lawful to record the comments or actions of another party or parties to a conversation. Conversations recorded without the knowledge or consent of the other party can be used as evidence in a lawsuit. Therefore, it is crucial that your supervisors conduct themselves in a professional manner and refrain from making biased or offensive comments, even if they are "joking around" and the employee appears to be participating.

The Appellate Division did offer some hope for employers by discussing the steps employers can take to limit their liability (periodically publishing its anti-harassment policy, maintaining an effective and practical grievance process, and holding training sessions for employees and supervisors about how to recognize and eliminate discrimination and harassment). Since Cowher said that the Facilities Manager responded to his complaints by instructing him to "ignore" the

comments, the court held that a jury would have to decide whether Cowher's employer could avoid liability.

What Employers Should Do

In view of *Cowher*, you should review your anti-harassment policy to be sure that it has been updated to include all of the categories protected by the LAD and federal anti-discrimination laws, and is broad enough to prohibit any slurs, epithets, teasing, or discriminatory comments in the workplace. The revised policy should be distributed to all supervisors and employees on an annual basis and explained in periodic training sessions.

Finally, be sure that you address all reports of harassing conduct seriously and document steps taken to end any inappropriate conduct.

For more information about how this new decision applies to your organization contact any attorney in the New Jersey office of Fisher & Phillips at (908) 516-1050.

The Legal Alert provides information about a specific recent New Jersey Appellate Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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