New Jersey Law Journal

VOL. 209 - NO 1 JULY 2, 2012 ESTABLISHED 1878

IN PRACTICE

EMPLOYMENT LAW

Protections Under LAD Continue To Expand

By Catherine Wells and Melissa Salimbene

The New Jersey Law Against Discrimination (LAD), N.J.S.A. § 10:5-1, et seq., which prohibits discrimination on the basis of numerous protected classes, including race, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, sex, gender identity or expression and other classes, is known to be among the broadest, if not *the* broadest, state fair-employment-practices laws in the country. In addition to the sweeping statutory protections under the LAD, the New Jersey courts have continued to interpret the LAD broadly, which only serves to further expand the scope of its coverage. The most recent example of the courts' liberal construction of the LAD is evidenced by the Appellate Division's decision in *Cowher v. Carson & Roberts*, 425 N.J. Super. 285 (App. Div. 2012).

In *Cowher*, the Appellate Division unequivocally held that the LAD applied not only to individuals who are members of a protected class, but also to those individuals who are *perceived* to be a member of a protected class even if they are not actually a member of that protected category. The plaintiff in *Cowher*, a truck driver, sued his former employer alleging a hostile work environment in violation of the LAD based upon anti-Semitic slurs directed to him on a daily basis by two supervisors. There was no dispute that the supervisors had made the anti-Semitic comments alleged; in fact, there was even a video recording of the supervisors making biased comments to Cowher and in his presence. Cowher not only told the individual defendants to stop making these comments, but he complained to another supervisor, who had also witnessed the inappropriate behavior. The defendant-supervisors, however, claimed their comments were merely part of a locker-room type exchange of racial, ethnic and religious comments in which Cowher willingly participated. Even though Cowher is not Jewish and the defendants denied that they perceived Cowher as Jewish, the defendants nonetheless admitted they teased him about being Jewish. In fact, they also allegedly mocked Cowher 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."

At the trial court level, the defendants moved for summary judgment, arguing that Cowher could not establish a prima facie case of a hostile work environment under the test enunciated in *Lehmann v. Toys R Us*, 132 N.J. 587, 603-04 (1993). Indeed, the defendants successfully argued before the trial court that Cowher could not demonstrate that the conduct "would not have occurred but for the plaintiff's Judaism." The trial court granted summary judgment in favor of the defendants, holding that New Jersey does not recognize a cause of action premised upon perceived membership in a protected group.

On appeal, the Appellate Division reversed the grant of summary judgment, holding that the LAD applies to those who are perceived to be a member of a protected class. In analyzing whether the perception that an individual is a member of a protected class was sufficient to state a hostile-work-environment claim, the Appellate Division noted that the issue of "perception" first arose in the disability context. The Appellate Division discussed a number of perceived disability cases, some of which even hinted that individuals *perceived* to be a member of any protected class should be protected by the LAD. For example, in *Poff v. Caro*, 228 N.J. Super. 370 (Law Div. 1987), a case where a landlord declined to rent an apartment to three gay men due to his fear that they would contract AIDS, the court explained that the distinction between a membership in a protected category and a perceived membership in that class is nonsensical, stating:

> Discrimination based on a perception of a handicap is within the protection of the Law Against Discrimination. Distinguishing between actual handicaps and perceived handicaps makes no sense. For example, in the case of racial and reli-

Wells is a member of Wolff & Samson PC, in West Orange, and chairs the firm's employment group. Salimbene is an associate with the firm.

> gious discrimination, the Law Against Discrimination cannot reasonably be read to prohibit a landlord from refusing to rent to a member of a racial or religious minority, but to allow a landlord to refuse to rent to a person who is only perceived by the landlord to be such a member. Prejudice in the sense of a judgment or opinion formed before the facts are known is the fountainhead of discrimination engulfing medical disabilities which prove on examination to be ... non-existent.

New Jersey courts have routinely applied this reasoning in cases of perceived disability and have suggested that the same reasoning should apply to all protected classes. For example, in *Heitzman v. Monmouth County*, 321 N.J. Super. 133 (App. Div. 1999), the plaintiff, who was of Jewish ancestry but not a practicing Jew, filed suit alleging a hostile work environment based on a series of anti-Semitic comments directed at him. There, like in *Cowher*, the trial court rejected the plaintiff's claim because he was not Jewish, and even if he was, the comments were not sufficiently severe or pervasive to state a hostile work environment claim. The Appellate Division upheld the trial court's determination that the comments were not sufficient to be actionable under the LAD, but expressly rejected the trial court's holding that the plaintiff was not a member of a protected category simply because he was not a practicing Jew. The Appellate Division noted that the plaintiff was an ancestral Jew, and "even if plaintiff was not actually Jewish, he could pursue a claim under the LAD because there is evidence defendants perceived him to be Jewish."

Relying on these earlier cases, the Appellate Division in *Cowher* stated that it was "satisfied that there is no reasoned basis to hold that the LAD protects those who are perceived to be members of one class of persons enumerated by the Act and does not protect those who are perceived to be members of a different class, as to which the LAD offers its protections in equal measure." In other words, if the LAD protects those who are perceived to be disabled, it should also protect individuals who are perceived to be a member of any other protected class. Thus, the Appellate Division held that, in light of the facially discriminatory conduct of the defendants, it is reasonable to infer that the conduct was spurred by the defendants' perception that the plaintiff was Jewish.

After concluding that the trial court erred in ruling that Cowher failed to satisfy the first prong of the *Lehmann* analysis, the Appellate Division then considered whether Cowher offered evidence that the conduct was sufficiently severe or pervasive to create a hostile work environment. In evaluating the evidence, the Appellate Division stated that "although the plaintiff is not Jewish, the proper question in this case is what effect would defendants' derogatory comments have on a reasonable Jew, rather than on a reasonable person of plaintiff's actual background."

The Appellate Division analogized the *Cowher* case to *Cutler v. Dorn*, 196 N.J. 419 (2008), a case wherein a Jewish police officer was subjected to biased remarks and epithets based upon his religion. Like the plaintiff in *Cowher*, the plaintiff in *Cutler* was also alleged to have been a participant in what has been characterized as "locker room banter." While the Appellate Division in *Cowher* observed that the conduct in *Cutler* was somewhat different, the court nonetheless concluded that "we are satisfied that the comments directed at plaintiff were of roughly comparable severity and pervasiveness" as those in *Cutler*. Based on the foregoing, the Appellate Division reversed the trial court's grant of summary judgment in favor of the defendants.

The Appellate Division's decision in *Cowher* is significant because it further confirms that New Jersey courts will continue to construe the LAD broadly. Not only did the *Cowher* court make clear that New Jersey recognizes a cause of action under the LAD premised on perceived membership in *any* protected class, but the court reaffirmed the flexible approach utilized in analyzing discrimination claims. Indeed, the Appellate Division in *Cowher* adopted a lower standard by holding that the critical factor in ascertaining whether the plaintiff met his burden to establish that the conduct was severe or pervasive, required only proof of the effect of the anti-Semitic remarks on a reasonable Jew. Such an expansion of the LAD is not surprising in light of prior decisions applying the LAD to individuals who are perceived to have a disability, even though those individuals did not actually have a qualifying disability. Thus, whether litigating employment discrimination claims or counseling employers with regard to these issues, lawyers must carefully evaluate the case in light of the broad-sweeping statutory protections afforded by the LAD itself, as well as the liberal construction of the law, which is intended to eradicate the cancer of discrimination. ■