There Are Zero Reasons Not To Enforce Zero-Tolerance Policies Prohibiting Discriminatory

June 29, 2021

Porzio Employment Law Monthly

Quoting the seminal case of *Lehmann v. Toys R Us, Inc.*, the New Jersey Supreme Court recently reminded employers, "'As community standards evolve, the standard of what a reasonable [person] would consider harassment will also evolve.' That holds true today as well." *Rios v. Meda Pharmaceuticals, Inc.*, A-23-20, ___ N.J. ___ (June 16, 2021) (quoting *Lehmann v. Toys R Us, Inc.*, 132 N.J. 587, 612 (1993)). In the *Rios* decision, the Court applied its 1998 holding in *Taylor v. Metzger* to reverse an Appellate Court decision upholding a trial court's grant of summary judgment against a plaintiff who alleged his supervisor had made two remarks to him wherein she used a slur to describe people of Hispanic origin. In so holding, the Court clarified its standard for evaluating whether and when single utterances of racial epithets create a hostile work environment violative of the New Jersey Law Against Discrimination (NJLAD), *N.J.S.A.* 10:5-12, *et seq*. Employers evaluating their anti-harassment and anti-discrimination policies following the *Rios* decision should ensure that they are implementing, maintaining, and training employees and supervisors on zero-tolerance policies that expressly prohibit harassing and discriminatory workplace language.

Evolution of the Law on Single Utterances, from *Lehmann* to *Rios*

For nearly three decades, New Jersey Courts analyzing whether an employee has suffered harassment violative of the New Jersey Law Against Discrimination have been guided by three words: "severe or pervasive." See *Lehmann v. Toys R Us, Inc.*, 132 N.J. 587, 606-607 (1993). The standard for measuring whether conduct is sufficiently "severe or pervasive" to violate the law depends on whether a reasonable member of a plaintiff's protected class (i.e., race, gender, religion, national origin, etc.) would believe "the conditions of employment are altered and the working environment is hostile or abusive." *Lehmann,* 132 N.J. at 603-604. In articulating this standard, the New Jersey Supreme Court anticipated that "it will be a rare and extreme case in which a single incident will be so severe that it would, from the perspective of a reasonable [person] make the working environment hostile." *Id*. at 606-607. The Court recognized, however, that "such a case is certainly possible" and that "[n]o purpose is served by allowing that harm to go unremedied merely because it was brought about by a single, severe incident of harassment rather than by multiple incidents of harassment." *Id*. at 607.

Five years later, the Supreme Court had occasion to address the single-incident scenario, and held that although "[u]sually repeated racial slurs must form the basis for finding that a hostile work environment has been created[,]" a remark setting forth an "unambiguously demeaning racial message" could be "sufficiently severe to contribute materially to the creation of a hostile work environment." *Taylor v. Metzger*, 152 N.J. 490, 500-502 (1998). There, the plaintiff's highest level supervisor had uttered a term[1] on the basis of plaintiff's African American race that that court described as "patently a racist slur, and . . . ugly, stark and raw in its opprobrious connotation." *Taylor*, 152 N.J. at 502.

Although lower courts have been free to interpret the applicability of the 1998 *Taylor* decision to various circumstances, the Supreme Court did not opine again until June 2021 as to any other scenario in which a single utterance of a racial epithet might be sufficiently severe or pervasive to create a hostile work environment. In the recent case of *Rios v. Meda Pharmaceuticals, Inc.,* an employee alleged that his supervisor directed to him, on two occasions, a racial slur relating to his Hispanic origin. *Rios v. Meda Pharmaceuticals, Inc.,* A-23-20, ___ N.J. ___ (June 16, 2021). Specifically, the employee alleged that his supervisor said, in the context of the employee's plan to buy a new house, "it must be hard for a [redacted] to have to get FHA loans." *Rios,* ___ N.J. at 2. The employee further alleged that his supervisor commented, on a separate

occasion, that an actress being considered for casting in a company commercial, "would work if she didn't look too [redacted]-y." Despite recognizing that the utterances contained "a national origin epithet that even if uttered only twice, could have met the severity requirement and sustained a hostile work environment claim" the Appellate Division affirmed the trial court's dismissal of the case based on the "absence of evidence that Rios faced adverse employment consequences because of his complaints about Cheng-Avery's comments, and on the lack of corroboration for his testimony." *Id*. at 6. Chief Justice Rabner, writing for a unanimous Court, held that the two slurs were, in fact, sufficiently severe or pervasive to create a hostile work environment in violation of NJLAD, and reversed and remanded the case for trial. *Id.* at 3.

Significance of the *Rios* Decision

The *Rios* decision is significant for several reasons. First, the decision clarifies that the Supreme Court's reasoning in *Taylor* applies to racial epithets outside of the most egregious slurs directed to African-American persons, as well as slurs that are uttered in the context of comments or remarks that do not constitute direct incidents of name calling. This suggests that lower courts may be more likely, going forward, to take a more liberal approach to evaluating whether a single utterance meets the "severe or pervasive" standard. Also notable, the remarks alleged both in *Taylor* and the instant case were attributed to a supervisor, and the Court opined, "Cheng-Avery's position as a supervisor compounded the severity of the alleged remarks. *Taylor* emphasized the overarching responsibilities of a supervisor to prevent and put an end to racial harassment in the workplace." *Id*. at 17 (citing *Taylor,* 152 N.J. at 503-05.) This suggests that lowers courts may apply a higher standard to remarks made by supervisors, as opposed to those made by non-supervisory co-workers, in deciding whether such remarks create a hostile work environment. Finally, the Court recognized the alleged failure to act on the part of individuals to whom Plaintiff claims he complained, and noted that this also contributed to the possibility that a reasonable person of Hispanic origin in the plaintiff's position would have felt the work environment was hostile. This suggests that lower courts may reach varying outcomes in cases where an employer's reporting and remediation mechanisms function effectively.

Best Practices Following *Rios*

Following the *Rios* decision, it remains a best practice to maintain "zero-tolerance" policies expressly prohibiting all employees and supervisors from using any harassing or discriminatory language in the workplace, and to ensure that all employees are trained on such policies. Employers should offer separate training for supervisors, not only regarding these policies, but regarding how to respond properly to reports of harassment and discrimination, and should appoint qualified persons to investigate and address all complaints promptly, even if an employee alleges only a single, indirect utterance of a slur connected with a legally protected status, and even if the allegation is made by a co-worker, rather than a supervisor. Employers are encouraged to outline this process in their employee handbooks, and to instruct employees to document each step taken in furtherance thereof.

---

[1] Out of respect for our readers, we do not share in this article the precise epithets used and have redacted them from cited quotations. Readers who believe this information to be useful are free to reference the cited case law or to contact a Porzio attorney for assistance in locating a copy of the Court's original language.