NJ Justices' Ruling Instructs On Hostile Workplace Claims

By **Martin Fojas, Noel Lesica and Katarina Kingston** (July 15, 2021)

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On June 16, the New Jersey Supreme Court issued a stark reminder that a supervisor's isolated but highly offensive comments may — on their own — be enough to sustain a hostile work environment claim under New Jersey's Law Against Discrimination.

With many human resources professionals and legal advisors dealing with COVID-19 and its associated health and safety regulations for over a year now, this case presents an opportunity to refocus — and reinforce — the need to prevent and address potential hostile work environment claims in a timely and diligent manner.

The facts before the court in Rios v. Meda Pharmaceutical Inc.[1] were simple and straightforward.

Rios — a Hispanic employee — alleged that his supervisor directed two racially motivated slurs against him.

One comment occurred when Rios expressed interest in purchasing a new home. According to Rios, his supervisor responded using an ethnic slur to assert that it would be difficult for Rios to get a Federal Housing Administration loan.

One month later, Rios claims his supervisor again used the same ethnic slur when commenting on an actress whom they were casting for a company commercial.

The supervisor denied making the comments, and there were no witnesses nor other corroborating evidence for either comment.

Analyzing the alleged comments "from the perspective of a reasonable Hispanic employee in [the plaintiff's] position," and upon a review of all circumstances, as settled law requires, the court determined "a rational factfinder could have reasonably found ... that the alleged slurs directed at [Rios] were sufficiently severe to create a hostile work environment."

Three key considerations contributed to the court's holding: (1) the two comments were "highly offensive and demeaning slurs," (2) the supervisor's elevated position "compounded the [remarks'] severity;" and (3) the company's human resources representative was allegedly "dismissive" when Rios reported the comments to human resources.

It is settled law in New Jersey and under Title VII of the Civil Rights Act[2] that employees pressing hostile work environment claims are required to prove that the alleged conduct directed against them on account of their protected status was sufficiently severe or pervasive to create a hostile or intimidating work environment.[3]

Federal and state courts applying this standard generally interpret this disjunctive as follows: The more severe the alleged misconduct, the less frequently it must occur to reach the required hostile environment threshold.

On the other end of the spectrum, conduct or statements considered mildly offensive must occur more frequently to establish a claim.

Prior to the Rios decision, in 1998 the New Jersey Supreme Court found in Taylor v. Metzger that a single, highly offensive racial slur created a sufficient fact issue to survive summary judgment on a plaintiff's hostile work environment claim.[4]

The plaintiff in Taylor, a sheriff's officer, alleged that the county sheriff greeted her with a racial epithet in the presence of another senior sheriff.

In reversing the grant of summary judgment below, the court analyzed the surrounding circumstances and determined that the severity of the single remark was exacerbated by the facts that (1) the chief executive of the employee's office made it (2) in the presence of another supervising officer, and (3) its mere utterance caused the plaintiff's coworkers to laugh at and mock her.[5]

The court further observed that the alleged remark "[i]s a slur that, in and of itself, is capable of contaminating the workplace."[6]

Since Taylor, New Jersey courts have rarely found isolated offensive comments, without more, to be sufficiently severe to support a hostile work environment claim. The surrounding circumstances may increase the comment's severity, though.

For example, in Flizack v. Good News Home for Women Inc. in 2001, the Appellate Division of the New Jersey Superior Court found that isolated racially and sexually charged comments by a high-ranking supervisor established a hostile work environment where they were accompanied by unwanted physical contact with the employee.[7]

Similarly, in Vanhook v. Cooper Health System, the U.S. District Court for the District of New Jersey earlier this year held that a supervisor's remarks criticizing a disabled employee for missing work were not — by themselves — severe enough to create a hostile work environment, but that similar remarks would be sufficiently severe if the remarks were directed toward the employee's disability and were laced with expletives.[8]

Cases in which the court considered an outrageous and offensive statement on its own sufficient to create a hostile work environment are highly unusual.[9]

In Rios, by contrast, Rios' supervisor was not a high-level executive, there was no evidence corroborating the alleged remarks and Rios' supervisor was not alleged to have been openly aggressive or hostile in either instance.

Nevertheless, the court found that Taylor and subsequent decisions did not articulate any set of minimal facts necessary to allege a hostile work environment.

Moreover, the human resources department's failure to respond to Rios' complaints appears to have impacted the court's analysis of whether the complained-of conduct was sufficiently severe or pervasive to create a hostile work environment.

This decision reminds employers that racial epithets, jokes or comments of any kind cannot be tolerated in the workplace.

More broadly, the opinion reinforces the need for thorough and effective nondiscrimination

and anti-harassment policies and training. Such training is not only important for managers and supervisors, but for all employees, regardless of level.

These principles hold true even in today's more prevalent remote work environment. While harassment and discrimination claims appear to have declined over the last year due to the pandemic, with more employees working from home than ever before,[10] companies must nevertheless be mindful that harassing behavior can ensue in the absence of direct in-person contact.

Discriminatory animus revealing itself by way of offensive remarks or name-calling can easily manifest via email, text message, instant messaging or video conferencing.

The person receiving such remarks — or witnessing such remarks, even if by happenstance — may argue that their very utterance on one occasion, if sufficiently offensive, may alone substantiate a hostile environment claim.

Thus, routine training on appropriate workplace conduct remains a cornerstone to reducing exposure, even in a remote workplace.

This decision further reminds employers of the important role that supervisors and managers play within their organizations and, by extension, their need to select supervisors wisely.

Employees that serve in any managerial capacity effectively serve as a company's eyes and ears when it comes to addressing and preventing workplace discrimination and harassment. Supervisors should be expected, consistent with legal requirements, to address any improper conduct that they personally observe or that comes to their attention.

But supervisors serve another key aspect as well — they are role models for the entire organization. As the New Jersey Supreme Court in Taylor recognized: "A supervisor has a unique role in shaping the work environment."[11]

As such, supervisors cannot effectively enforce companies' anti-harassment and discrimination policies if they themselves cross the proverbial line with respect to their own conduct and communications when dealing with subordinates, other colleagues or even third parties in the workplace.

Likewise, human resources professionals must remain vigilant and be prepared to investigate and respond to employee complaints promptly and appropriately.

In that regard, one can hardly be too cautious in flagging problematic behavior. Even conduct that might be considered borderline in terms of perceived offensiveness will generally warrant immediate attention and response.

As the Rios case made clear, a human resources professional's dismissiveness of a genuine complaint can be considered evidence that a company presented with an opportunity to right the wrong instead failed to address and prevent workplace discrimination.[12]

The takeaways of Rios are clear.

First, employers are wise to adopt an ultracritical eye with respect to the whole spectrum of behaviors that may violate anti-discrimination laws — including even isolated offensive remarks.

Second, management and human resources professionals must take immediate action when they become aware of objectionable behavior or learn of complaints.

Paying heed to these principles can help reduce employers' exposure to such costly and time-consuming litigation.

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[1] Armando Rios, Jr. v. Meda Pharmaceutical, Inc. (A-23-20) (084746).

[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq.

[3] Some jurisdictions, such as neighboring New York State and New York City, have eliminated the "severe or pervasive" standard for hostile work environment claims under the New York State and New York City Human Rights Laws, respectively.

[4] See Taylor v. Metzger, 152 N.J. 490, 508 (1998).

[5] Id.

[6] Id.at 503 (citing Bolden v. ABF Fabricators, Inc. 864 F.Supp. 1132, 1133-34 (N.D. Ala. 1994)).

[7] See Flizack v. Good News Home for Women, Inc., 346 N.J. Super. 150, 161-62 (App. Div. 2001).

[8] See Vanhook v. Cooper Health Sys., No. 19-14864, 2021 U.S. Dist. LEXIS 101362, at *31 (D.N.J. May 28, 2021).

[9] See El-Sioufi v. St. Peter's University Hosp., 382 N.J. Super. 145, 179 (App. Div. 2005).

[10] EEOC, Enforcement and Litigation Statistics, https://www.eeoc.gov/statistics/enforcement-and-litigation-statistics.

[11] Taylor, 152 N.J. at 503.

[12] Rios at 17.