Voice of the Bar

Cutler Ruling Seen as Sign of Courts Pulling Back from *Taylor v. Metger*

Dear Editor:

As an attorney dedicated to the representation of employees in the field of employment-discrimination law, and a person who is Jewish, I must state my vigorous objection to the article by Jed Marcus, "Plaintiffs in Glass Houses Cannot Claim Discrimination," published in your July 9 issue.

While portraying himself as a person "opposed" to the differential treatment by the courts of discrimination against various minority groups, as lately reflected in *Cutler v. Dorn*, 390 N.J. Super. 238 (App. Div. 2007), it would seem that Mr. Marcus's true motive is the reconsideration of the high standards established by the court for recognizing discriminatory language and conduct in *Taylor v. Metzger*, 152 N.J. 490 (1998).

Mr. Marcus is a longstanding member of the defense bar in defense of employment discrimination cases, although he does not *quite* say so in his article.

More importantly, in celebrating the spectacle of the Appellate Division's gross insensitivity, in *Cutler*, to conduct and language which is unmistakably offensive to many Jews, myself included, Mr. Marcus seems to put profit ahead of principle, and decency.

In *Cutler*, the Appellate Division gave the imprimatur of approval to language and behavior that, if similarly addressed with respect to any other minority group, would arouse immediate attention from racial, women's, gay and other defense organizations. A measure of the court's insensitivity is the fact that it *did not need* to engage in approval of racist language and conduct if it merely wished to uphold the verdict, as is on the basis of plaintiff's *alleged* contributory conduct.

Eight years after the disastrous 2-1 opinion of the Appellate Division in *Heitzman v. Monmouth County*, 321 N.J. Super. 133 (App. Div. 1999), *Cutler* brings to the number of decisions by the Appellate Division that give *judicial approval* to conduct and language which, to the reasonable Jewish person, instantly reminds us of the type of explicit anti-Semitism so long given tacit if not explicit approval in America before and during World War II.

I would remind Mr. Marcus, and those celebrating with him, of the dissent by Judge Arthur Lesemann in *Heitzman*, a case that, despite the 2-1 split, was never appealed to the Supreme Court. It appears plaintiff Heitzman had not complained about certain of the remarks by a coworker, such as "if Hitler were alive, he would make a lampshade out of [you]." It further appeared that various anti-Semitic remarks were made by a supervisor but, according to the majority decision, were not severe or pervasive.

Judge Lesemann said, in part: "The majority acknowledges that the comments aimed at plaintiff were anti-Semitic, and also seem to acknowledge that 'a reasonable person of Jewish ancestry undoubtedly would find [at least some of] these comments to be offensive.' Nevertheless, it concludes that the remarks were 'at worst teasing remarks' which were not sufficiently extreme to create an abusive or hostile workplace. I find that characterization unwarranted, since I believe a reasonable jury could well conclude that plaintiff had been subjected to a most unpleasant, most hostile, and grossly abusive workplace which he should not have been required to tolerate." 321 N.J. Super. 133, 150.

Lesemann added: "I see no reason why plaintiff should be required to tolerate what plaintiff says he was exposed to here. LAD may not have legislated against "discourtesy or rudeness," or adopted a "general civility code," but it did outlaw a workplace in which one is required to live with and endure ethnic slurs of the quality and frequency with which [the supervisor] and his associates belabored plaintiff. *Plaintiff should not be required to accept such conduct any more than an African American should be required to tolerate anti-black jokes, or a woman tolerate a pattern of sexist humor or snide sexual remarks.*" Ibid. at 152 (Emphasis added).

It would appear that the notorious "slippery slope" instigated by the majority opinion in the oft-cited *Heitzman* case has now culminated in the "more slippery slope'" of *Cutler*, if its language is not strongly disapproved by the Supreme Court. These cases together treat discrimination against Jews differently from discrimination against other minorities, and together they tolerate a level of behavior which, although in the guise of humor, is more reminiscent of the "humor" reportedly displayed by Klan members against blacks and by prison guards at Auschwitz. There is no humor in racism, nor can the symbolism of a "German" flag replacing an Israeli flag be treated as humor, or ignored, when the object of the humor is any minority.

It is embarrassing to me, as a lawyer usually proud of our judicial system, that the defense bar does not rise up with the plaintiffs' bar in protest against the garish *Cutler* opinion instead of seeking to use it as a wedge to attack *Taylor v. Metzger*.

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NJ Public Defender Is Also an Accredited CLE Provider

Dear Editor:

While you recently reported that only four county bar associations in New Jersey are currently accredited as CLE providers by the Pennsylvania CLE Board ["County Bars Become MCLE-Minded," June 25], you neglected to report that the New Jersey Office of the Public Defender has also been accredited as a CLE provider by the Pennsylvania CLE Board since October 30, 2003. We provide no-cost, quality CLE programs that earn CLE credits for public defender staff and pool attorneys who can ill afford to pay for CLE training otherwise, and we plan to continue doing so in the era of MCLE likely to arrive soon.

Leah McGarry Morris
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