# CO-WORKER BACKLASH IN THE WAKE OF A DISCRIMINATION COMPLAINT IS NOT ENOUGH TO SUSTAIN A CLAIM OF RETALIATION OR CONSTRUCTIVE DISCHARGE

**By Kevin J. O'Connor***

In yet another common-sense employment decision to be issued by the New Jersey Appellate Division, the Court recognized the limits on vicarious liability of an employer for harassing acts of a non-supervisory employee, as well as the significant proofs that must be marshaled in order to prove constructive discharge. The Court established that co-worker backlash against an employee for having made a discrimination complaint cannot, standing alone, be enough to impose liability on an employer for either retaliation or constructive discharge.

Dunkley v. S. Coraluzzo Petroleum Transporters, Slip Op. A-3252-12T1 (N.J. Super. Ct. App. Div. Sept. 16, 2014) (which has been approved for publication) involves claims by plaintiff Brian Dunkley who sued his former employer, S. Coraluzzo Petroleum Transporters ("SCP Transporters") under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49 ("LAD") for damages stemming from alleged racial discrimination and constructive discharge. Writing for the Court, Judge Liholtz ruled that "plaintiff's complaints of avoidance by fellow employees after he reported acts of racial discrimination by a co-worker [were] insufficient to support an LAD claim for retaliatory discharge or impose vicarious liability on the employer".

The LAD is a formidable weapon designed to eradicate the "cancer of discrimination". It packs a strong punch, with its threat of attorney's fees, emotional distress damages, front and back pay, and punitive damages. The Dunkley opinion represents a common-sense approach where an employer institutes a policy against discrimination and

enforces the policy when triggered by an employee complaint. Dunkley serves to remind employers to have proactive policies and training programs in place to insulate employers from liability in circumstances such as these.

The record on appeal showed that Dunkley's employer had provided him with an employee handbook which contained an anti-harassment policy. Plaintiff's trainer accompanied him on training rides for a period of approximately 2 weeks and allegedly harassed him by making racially inappropriate comments and observations.

When plaintiff did not report for work, his supervisor called him to inquire about his absence. Plaintiff then reported the alleged harassment. The next day, an investigation was started. Plaintiff returned to work approximately one day later, and never again saw or spoke to the co-worker who was reportedly harassing him. Following his reassignment to work with another trainer, plaintiff suffered no treatment similar to that experienced with the alleged harasser.

However, plaintiff insisted he endured negative consequences after reporting the alleged harassment, and these consequences caused his “constructive discharge”. He noted his report was not kept confidential and he felt ostracized by coworkers, who "would shy away" from him. "The guys that were in the yard that [he] used to know, they wouldn't even say a word to [him] after that. And everybody knew [he] was with [Harrington], and then all of a sudden [there was] a big change."

Plaintiff insisted he was uncomfortable at work and "felt like [his] life was threatened" because he was not sure whether the alleged harasser was affiliated with a motorcycle gang or "the Klan," or whether these groups "had chapters around Vineland[,]" where defendant was located, as he knew "Vineland had had a Klan meeting [at a nearby park] when [he] was younger . . . ." As a result, plaintiff remained concerned for his and his

family's safety. The immense daily stress made plaintiff "hate being there [at work] at that time." Plaintiff resigned, and sued under LAD, alleging defendant allowed conduct amounting to a hostile work environment (counts one and two), which caused his constructive discharge (count three), and violated public policy (count four). He later amended his complaint to add a claim for violating the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8 (count five). The trial court granted the employer summary judgment.

On appeal, plaintiff argued that the court should not have dismissed the complaint because defendant failed to take proper steps to curb discriminatory conduct "because defendant's anti-harassment policy lacked structure and monitoring mechanisms; defendant did not train its supervisors and employees regarding the anti-harassment and anti-retaliation policies; and plaintiff's complaints were not effectively addressed as defendant's upper management did not show "an unequivocal commitment" to assure "harassment would not be tolerated."'

The trial court had concluded that plaintiff could show a hostile work environment but that plaintiff had not sustained his burden to prove defendant was vicariously liable for the alleged harasser's conduct because he could not demonstrate defendant's supervisors knew about and ignored, participated in, or failed to take action to prevent such harassing conduct.

The Court first recognized that whether the alleged harasser was plaintiff's supervisor was "debatable," but further recognized that much more has to be shown to hold an employer vicariously liable for the harasser's conduct: "Lehmann and its progeny make clear

vicarious liability is dependent upon additional facts." The Court went on to recognize that

> "An employer's vicarious liability for the conduct of a supervisor occurs "'if the employer negligently or recklessly failed to have an explicit policy that bans . . . harassment and that provides an effective procedure for the prompt investigation and remediation for such claims." (citing Toto v. Princeton Twp., 404 N.J. Super. 604, 616 (App. Div. 2009). See also Lehmann, v. Toys 'R' Us, Inc., 132 N.J. 587, 621 (stating that to impute liability to a defendant-employer for acts of its employees, "a plaintiff may show that an employer was negligent by its failure to have in place well-publicized and enforced anti-harassment policies, effective formal and informal complaint mechanism structures, training, and/or monitoring mechanisms.").

The employer in Dunkley showed that it provided each employee with a handbook "which contained a directed policy prohibiting harassment and discrimination," and directed them to read it and become familiar with it. The handbook described the complaint procedure and investigation process to be followed and assured employees that complaints would be handled promptly and fairly.

Also, there was an express anti-retaliation policy:

> "Any employee who files a complaint of sexual harassment or other discrimination in good faith will not be adversely affected in terms and conditions of employment and will not be retaliated against or discharged because of the complaint.
>
> In addition, we will not tolerate retaliation against any employee who, in good faith, cooperates in the investigation of a complaint. Anyone who engaged in such retaliatory behavior will be subject to appropriate discipline, up to and including termination."

"[T]he existence of effective preventative mechanisms provides some evidence of due care on the part of the employer." Lehmann, supra, 132 N.J. at 621. Moreover, "the absence of such mechanisms" does not "automatically constitute[] negligence, nor [does] the presence of such mechanisms demonstrate[] the absence of negligence." Ibid. The Court reaffirmed the elements of a good anti-harassment policy:

> "Employers that effectively and sincerely put five elements into place are successful at surfacing . . . harassment complaints early, before they escalate. The five elements are: policies, complaint structures, and that includes both formal and informal structures; training, which has to be mandatory for supervisors and managers and needs to be offered for all members of the organization; some effective sensing or monitoring mechanisms, to find out if the policies and complaint structures are trusted; and then, finally, an unequivocal commitment from the top that is not just in words but backed up by consistent practice."

The Appellate Division affirmed summary judgment in the employer's favor given the existence of the policy and the evidence that it was enforced, once plaintiff availed himself of the policy. "Here, despite knowing the procedures, plaintiff simply failed to follow them." The best evidence of the policy's effectiveness was, perhaps, that plaintiff himself reported that " he did not experience any further discriminatory harassment and suffered no change in his position, duties or compensation…"

On the issue of retaliation, the Court recognized that plaintiff could not proceed to trial on a theory that he was ostracized by co-workers following his internal complaints. "[P]laintiff's perceived ostracism by coworkers fails to support his claim of hostile work environment." (Id.) (citing Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 38283 (Law Div. 2002) ("The fact that [the plaintiff's] co-workers and superiors chose to limit their contact with [him] to business only and otherwise ignored [him], stared/glared at [him] when they walked by [him], and, even as plaintiff believed — talked about [him] behind closed doors," fails to create a hostile work environment.), aff'd 362 N.J. Super. 245, 246-47 (App. Div.), certif. denied, 178 N.J. 32 (2003).

Also of significance is the Court's holding that no constructive discharge claim could be pursued by the plaintiff. "Essentially, he calls into question the effectiveness of defendant's policy. We are not persuaded." Judge Liholtz summarized the significant burden on a litigant hoping to recall on such a claim:

> "[C]onstructive discharge requires not merely severe or pervasive conduct, but conduct that is so intolerable that a reasonable person would be forced to resign rather than continue to endure it.'" The level of proof requires a showing of "egregious circumstances," which is even greater "than that required to establish a hostile work environment[.]" Ibid. The proofs must show 'outrageous, coercive and unconscionable' acts." (citations omitted).

Since plaintiff admitted that once he informed his superiors, they took action, assigned him a new trainer and, thereafter, he experienced no problems, and that he never interacted with the alleged harasser again, he could not get to a jury with his claims.

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