The Unfortunate Truth in Establishing a Hostile Work Environment Claim

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Have you "heard through the grapevine" that a co-worker has been making racist remarks about you? If your answer to this question is a resounding "yes," then you likely believe you have a valid racial discrimination lawsuit against your co-worker and employer. Not so fast.

It is well-settled that New Jersey has a strong interest in maintaining "discrimination-free workplace[s]" for workers. Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 600 (1993). In conformance with this principle and to provide an effective means "to root out the cancer of discrimination," the Legislature enacted the remedial Law Against Discrimination ("LAD"). Cicchetti v. Morris Cty. Sheriff's Office, 194 N.J. 563, 588 (2008). Among the prohibited forms of employment discrimination under the LAD is harassment, based on race or ethnicity, which creates a hostile work environment. See Lehmann, 132 N.J. at 601.

The New Jersey Supreme Court has made it clear, however, that a hostile work environment claim cannot be based solely upon statements that are made outside of the presence of a plaintiff. Specifically, in Cutler v. Dorn, 196 N.J. 419, 430-31 (2001), the Court declared the inquiry is whether a reasonable person of plaintiff's protected class would consider the "workplace acts and comments made to, or in the presence of, plaintiff" to be sufficiently severe or pervasive to alter the conditions of employment. See also El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 178 (App. Div. 2005). While this high standard will inevitably result in the preclusion of many otherwise valid hostile work environment claims, it serves a valid purpose that is directly in line with the New Jersey Rules of Evidence: barring inadmissible hearsay.

Under Rule 801(c), "[h]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Long considered untrustworthy and unreliable, hearsay is generally inadmissible because it lacks any indicia of reliability. See State v. Miller, 170 N.J. 417, 426-27 (2002). This is precisely why the courts have determined time and again that hearsay allegations of comments not "made to, or in the presence of the plaintiff," are irrelevant to performing an objective analysis of a hostile work environment claim. Shockley v. Coll. of New Jersey, No. A-3212-10T4, 2012 WL 996621, at *12 (N.J. Super. Ct. App. Div. Mar. 27, 2012).

Theoretically, a plaintiff may contend that he was subjected to a hostile work environment due to the alleged conduct of a co-worker despite that fact that he never heard any racial slurs or epitaphs directed at him or used in his presence. To circumvent this glaring deficiency, the plaintiff may attempt to testify about rumors of racially charged statements allegedly made by that co-worker to others to prove the existence of a hostile work environment. This is improper since the plaintiff does not have any personal knowledge as to whether the alleged statements were even made. "To satisfy the severe-or-pervasive element of a hostile work environment claim, a plaintiff must marshal evidence of bad conduct of which she has firsthand knowledge." Godfrey v. Princeton Theological Seminary, 196 N.J. 178, 201-02 (2008). Mere "gossip evidence" about alleged other acts of harassment are inadmissible to demonstrate a hostile work environment. Id. at 201-02.

Trial judges must be "particularly assiduous" in enforcing the hearsay rule in hostile work environment cases. Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286, 319 (2006). Therefore, potential plaintiffs must think twice before filing lawsuits based solely on speculation and indirect acts of discrimination to support their hostile work environment claims.