

KEEP HOSTILITY OUT OF THE WORKPLACE

By Matthew A. Peluso, Esq.



Most people are familiar with the term “hostile work environment,” since it is often mentioned in newspaper articles and discussed on national television in the context of high profile sexual harassment and racial discrimination lawsuits throughout the country. However, many employees are not aware that a hostile work environment can also be created by workplace conditions that have nothing to do with these well-recognized prohibitions.

Essentially, a hostile work environment exists in this state when any “severe and pervasive” harassing, threatening, intimidating, professionally inappropriate, retaliatory or offensive conduct is allowed to exist by an employer in the workplace. However, the conduct must be sufficiently offensive and persistent to objectively create an abusive environment. One comment, even if derogatory and offensive, will generally not constitute a hostile work environment. A person is legally entitled to a work environment free of hostility, not to a perfect workplace, free of annoyances and colleagues they may find merely disagreeable.

Many employees mistakenly believe that there is an independent legal cause of action that can be brought against an employer for creating a hostile work environment. Rather, in New Jersey, an employee must first meet the elements of a recognized cause of action under one or more existing common law legal theories (such as, assault, intentional infliction of emotional distress, etc.), or be protected under a New Jersey or federal statute prohibiting certain conduct in the workplace.

These state and federal statutes range from well-known anti-discrimination laws to whistleblower statutes to organized labor laws and protected political activity. For example, the New Jersey Employer-Employee Relations Act (Act), New Jersey Statute 34:13A-1, et seq., makes it unlawful to discharge, harass, intimidate or retaliate against a worker because of his or her union activity. The First Amendment political speech in the workplace is also protected under the US and New Jersey Constitutions. A hostile work environment can be created if a supervisor harasses, pressures or threatens an employee to contribute to a particular political party or campaign.

Hostile work environment claims can also arise from other protected conduct by an employee, such as state and federal “whistleblower” statutes, including, but not limited to, the “Conscientious Employee Protection Act” (CEPA), New Jersey Statute 34:19-1, et seq., and the federal Whistleblower Protection Act of 2007. The New Jersey legislature enacted CEPA to “protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct.” CEPA was designed to provide broad protections against employer retaliation for employees acting within the public interest and is construed liberally by the courts of this state to effectuate its important social goal.

CEPA authorizes an aggrieved employee to bring a civil suit against an employer who retaliates against the employee for reporting illegal or unethical conduct in violation of the statute. However,

CEPA is not intended to protect chronic complainers or those who simply disagree with their employer’s lawful actions. Rather, it protects those persons who disclose their employer’s activities when a reasonable lay person would conclude that illegal activity was going on.

Regardless of the specific legal theory of liability, a “hostile work environment” claim is created by, and arises from, the underlying prohibited conduct (such as, sexual harassment, union intimidation, etc.) at issue. The type of prohibited conduct that is sufficient to create a hostile work environment is extensive, dynamic and dependent upon the specific circumstances of the subject workplace. A hostile work environment can be created by senior management, direct supervisors and even co-employees if senior management and/or supervisory staff become aware of its existence and fail to remedy the problem. The question is whether a “reasonable” person would believe that the regular conditions of employment have been altered by the prohibited conduct (harassment, threats, derogatory comments, etc.) and the working environment has become hostile for the complaining employee as a result thereof.

Most hostile work environment claims in this state arise from sexual assault/harassment claims, and from racial, gender and age discrimination claims brought by employees under the “New Jersey Law Against Discrimination” (LAD), New Jersey Statute 10:5-1, et. seq., or under one or more federal civil rights statutes, including, but not limited to, Title VII of the Civil Rights Act of 1964 (CRA) and the Age Discrimination in Employment Act of 1967 (ADEA). The LAD, CRA and ADEA prohibit discrimination in the workplace based upon the employee’s race, gender, religion, age, sexual preference and ethnic background, among other protected traits.

The LAD is not a fault- or intent-based statute. An employee is not required to prove that the employer intentionally discriminated or harassed them, or intended to create a hostile work environment. The purpose of the LAD is to eradicate discrimination, whether intentional or unintentional. As one court in this state concluded: “Although unintentional discrimination is perhaps less morally blameworthy than intentional discrimination, it is not necessarily less harmful in its effects, and it is at the effects of discrimination that the LAD is aimed.” Therefore, the harasser’s intent is not an element of a claim brought under the LAD.

Clearly, any sexual assault (or even repeated and unwanted physical touching), as well as any verbal sexual harassment, intimidation and aggressiveness, will constitute a hostile work environment. When an employee is harassed, threatened, mocked or intimidated by virtue of their race, gender, age or sexual preference, a hostile work environment exists. Derogatory racial, gender or ethnic comments in the workplace are prohibited under New Jersey and federal law, and any employer or supervisor who allows such comments to continue after becoming aware of their use will be liable for allowing a hostile work environment to exist. Such comments include racial or ethnic stereotypes even if allegedly made in jest. Also, this prohibition applies even if the racist or bigoted comments are being made by members of the same racial or ethnic group.

Under the LAD an employer is held "strictly liable" for equitable damages and relief in hostile work environment claims. Strict liability is a legal concept that originally arose out of product liability tort cases, and is easier to prove than other forms of civil liability since the claimant is not required to prove fault or intentional conduct. Instead, an employee claiming a hostile work environment only needs to prove that he or she was subjected to the underlying prohibited conduct (i.e. sexual harassment, racial or age discrimination, etc.), that it was abusive, and that the employer allowed it to persist.

Law enforcement officers work long hours in a stressful and dangerous environment. Consequently, they are particularly susceptible to a hostile workplace, since it adds even more pressure to an already difficult job. Also, law enforcement officers often unintentionally create a hostile working environment for their fellow officers because, like many people subjected to constant stress and danger, their "joking" with each other can sometimes cross the line to offensive behavior, even if unintended.

Unintended hostile and offensive conduct can also arise from the manner in which a law enforcement officer treats third-parties in the line of duty, including his or her interaction with local residents and even perpetrators. Derogatory racial, ethnic or sexist remarks made in the heat of an arrest and directed at a violent criminal can still create collateral hostility back in the locker room. Since criminal conduct knows no racial, ethnic or gender boundaries, there is no justification for derogatory or offensive conduct directed toward any one group that could unnecessarily offend a fellow officer.

As an attorney who has represented law enforcement officers in hostile work environment cases arising from racial and gender discrimination, as well as sexual harassment claims, I have seen first-hand the negative collateral affect that a constantly abusive, harassing and hostile work environment can have on a law enforcement officer. The harassers encourage others to join in, and reward negative information about the targeted officer. Duty

assignments change for the worse. Hyper-technical and hypocritical application of even minor procedures and codes of conduct are imposed on the targeted officer, which then leads to more serious, but false, charges of misconduct. Previously friendly officers become evasive and distant. Anger that can't be expressed at work finds release on suspects or at the home of the targeted officer. Off-duty alcohol use often increases and intensifies. Personal and family relationships strain under the stress, and domestic violence can result.

Camaraderie among law enforcement officers has always been strong and is a natural response to the important and dangerous job they perform together. There is a bond between officers that helps them to risk their lives for others and for each other. However, it is equally important for those exact same reasons that law enforcement officers be aware and respectful of the increasing racial, gender and ethnic diversity in their profession. Eliminating hostility inside the station can only help to reduce the already significant stress placed on law enforcement officers outside of it.

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