

Was it teasing or taunting?

Justices to hear Jewish cop's case

By Robert G. Seidenstein

For a Jew, when does a work environment turn hostile?

When supposedly teasing references to noses and money-making abilities are made? When the phrase "dirty Jew" is used, as in, "Let's kill all the dirty Jews?" When an Israeli flag decal and then a German flag decal are placed in a worker's locker?

How long must such "teasing" go on? What if the employee takes part in the "fun?" What if the employee really doesn't take part?

Eventually, Haddonfield Police Officer Jason Cutler failed to see the humor of the situations he faced and brought suit.

The jury found the Borough of Haddonfield allowed a hostile environment to exist in violation of the state's Law Against Discrimination (LAD), but it awarded no damages. The Appellate Division reversed the finding against Haddonfield.

Today, the New Jersey Supreme Court is scheduled to hear *Cutler v. Dorn*.

Although the case involves a Jew, it raises the question of whether legal standards somehow differ for plaintiffs depending on their ethnic group.

One of the *amicus* briefs is from The Sikh Coalition, in which Ravinder S. Bhalla of Hoboken said, "In light of the Appellate Division's holding in *Cutler*, one must ask whether a Sikh employee in New Jersey who is routinely called 'Bin Laden' and 'terrorist' in the workplace ... would be protected by the LAD."

Appellate Judge Joseph F. Lisa had said many of the instances of which Cutler complained were of a joking or teasing nature and not hostile.

Lisa said the officer had failed to show the offensive conduct met the legal standard of being as severe and pervasive as to make a reasonable person of his religion believe the work conditions had been altered and had become hostile.

He said although the "dirty Jew" remark "was undoubtedly disturbing, it was isolated, not specifically directed at plaintiff, and not made by a supervisor."

Lisa said the situation did not rise to the level of the one that formed the basis of *Taylor v. Metzger*. In that 1998 case, the New Jersey Supreme Court dealt with a sheriff's officer — a black woman — who was referred to as a "jungle bunny" by her supervisor, the Burlington County sheriff, when she greeted him.

The high court said that comment was sufficient to create a hostile work environment, declaring that even the uttering of "only one slur ... does not, as a matter of law," preclude such conduct from being deemed "extreme and outrageous."

Clifford L. Van Syoc of Cherry Hill, who represents Cutler, said, "It is apparent that the Appellate Division holds Jews to a higher standard than persons in other protected categories when determining whether a hostile work environment exists under the LAD."

Bhalla said the analysis by the Appellate Division "appears to originate from the perspective of the officers who engaged in the offensive conduct, not the victim of the conduct."

'True harm'

In an *amicus* brief submitted on behalf of the Anti-Defamation League, the American Jewish Committee and the Jewish Community Relations Council of Southern New Jersey, Philip Rosenbach of Berman Rosenbach in Morristown said, "Teasing" fails to capture the true harm these remarks were meant to convey. These statements were bigoted, relied on long-standing anti-Semitic canards and were calculated to isolate the plaintiff based on his religious heritage."

He added, "There is great danger in dismissing remarks such as 'those dirty Jews' as mere teasing, even in an employment setting in which derogatory humor and mutual recriminations was, unfortunately, the norm."

Jon W. Green of Green, Savits & Lenzo in Morristown, in a brief on behalf of the *amicus* National Employment Lawyers Association-New Jersey, said the Appellate Division "inaccurately and unfairly portrayed plaintiff as a bigoted participant in offensive discriminatory choking and taunting that permeated Haddonfield Police Department."

Green said there was "testimony of a relentless barrage of ethnic jokes and comments aimed at plaintiff by his police chief and supervisors on a regular basis over a four-year period."

Attorneys for Haddonfield and individual defendants are expected to argue the context of the remarks that were made show the environment was not hostile and that Cutler was a full participant in the culture of the police department.

How to roll out 10,000 Alcotest cases

By Dana E. Sullivan

Before the month is out, thousands of DWI defendants and their lawyers will receive notices that their cases will pick up where they left off — some more than two years ago — while the New Jersey Supreme Court was deciding if the new Draeger Alcotest unit is reliable.

Most of the drivers kept in limbo can expect their license to be suspended and some may even go to jail.

But some, especially if they have Alcotest readings that don't meet the new standards, may find the Supreme Court has given them a long shot at getting off the hook.

Following up on the court's ruling last month in *State v. Chun* that Alcotest is reliable, the Administrative Office of the Courts has issued instructions for municipal judges and their staffs to deal with a sentencing backlog in excess of 10,000 cases.

By the end of next week, judges and prosecutors should have a list of cases pending in their court, and judges should start scheduling hearings as soon as possible, even though the AOC didn't set a deadline for clearing them.

In most instances, an Alcotest blood alcohol reading over the limit will result in an open-and-shut hearing. But each

case must be evaluated in a worksheet that includes a formula to ensure the average readings are within the court's tolerance factor.

For instance, if there were two readings that are more than 10 percent apart, the Alcotest evidence would not be admissible.

This and other standards set in *Chun* may lend themselves to challenges of the conviction.

The AOC memo anticipates there will be challenges, and that municipal judges might not be ready to rule on the spot.

The memo said that "if the defendant or defense counsel raises facially meritorious issues calling into question the admissibility of defendant's Alcotest reading under *Chun*, the judge may ask the parties to brief the issues, so that the judge may give the issues thoughtful and deliberate consideration."

First offenses

Most of the cases stayed by the Supreme Court's order in January 2006 are first-offense cases, in which defendants were found guilty or pleaded guilty and were told of their sentences.

Imposition of the sentences, however, was stayed pending the outcome of a study by a special master and the court's final ruling based on that study.

The stay also said sentences should be imposed in second- and third-offense cases if there was sufficient evidence other than the Alcotest reading.

Jeffrey Evan Gold of Gold & Farrow in Cherry Hill, who represented the *amicus* New Jersey State Bar Association in *Chun*, said most pending cases are first offenses.

While acknowledging that clearing the backlog will be a strain for everyone involved, Gold praised the AOC for moving with "tempered urgency," formulating a procedure only 10 days after the court's ruling but not pushing municipal judges to hurry through the cases before they've had a chance to understand *Chun* and the Alcotest device.

"There is nothing wrong in our judges taking a few weeks to digest the 130-page opinion and its implications before making a mad rush to go forward," he said.

The AOC has scheduled three training sessions for municipal judges — April 22, May 13 and June 27 — and they are required to attend at least one.

Comments about this story may be sent to dana.sullivan@njnews.com.

Comments about this story may be sent to robert.seidenstein@njnews.com.

New Jersey State Bar Association

Annual Meeting and Convention

May 21-23, 2008

Trump Taj Mahal Casino Resort
Atlantic City

Earn up to 12 CLE credits at multiple practice-related track seminars at NJ Institute for Continuing Legal Education cosponsored programs

SPECIAL PRICING FOR:

First-Time Attendees
YLD Members
Government Attorneys

Visit www.njsba.com for meeting and registration details.

Your voice. Your vision.
The State Bar.



New Jersey State Bar Association
www.njsba.com

