STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 05468-10
DCR DOCKET NO. EM14WB-54045

Shi-Juan Lin and the Director of the New Jersey Division on Civil Rights, Complainants, v. Dane Construction Co., and Pat Buckley, Individually, Respondents.	Administrative Action **FINAL DECISION & ORDER**

Shi-Juan Lin, Complainant, *pro se*

Marisa Slaten, Deputy Attorney General (*Jeffrey S. Chiesa, Attorney General of New Jersey*) for the New Jersey Division on Civil Rights

Dennis Alan Auciello, Esq., for Respondents Dane Construction Co. and Pat Buckley

BY THE DIRECTOR:

This is a hostile work environment and constructive discharge case brought by New Jersey resident Shi-Juan Lin against an electrical contracting company located in New Brunswick, New Jersey, Dane Construction Company (Dane), and the company's owner, Pat Buckley. Lin alleged that she and Buckley worked together in a small three-person office where Buckley used the word "nigger" on a daily basis, even though he knew that her fiancé was black, that she was living in a black household with her fiancé's black parents, and that her young son was half-black. She alleged that despite complaining about the constant racial slurs to Buckley and her immediate supervisor, Office Manager David Gorman, the conduct continued and the situation became so intolerable that she felt compelled to resign.

On July 28, 2008, Complainant filed a verified complaint with the DCR alleging that Respondents subjected her to a hostile work environment based on race and national origin, and constructively discharged her, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49.[1] Respondents filed an answer denying the allegations of unlawful conduct. On February 1, 2010, the DCR issued a finding of probable cause.

The DCR's attempts to resolve the matter through conciliation were unsuccessful. On May 7, 2010, the matter was transmitted to the Office of Administrative Law (OAL). After a hearing, an administrative law judge (ALJ) issued an initial decision on September 20, 2012, recommending that the complaint be dismissed. The parties submitted exceptions in November 2012.

After evaluating the record, the parties' exceptions and replies, and guided by caselaw and settled rules of statutory construction, the Director hereby concludes that the Complainant was subjected to a racially hostile work environment and constructively discharged.

THE ALJ's DECISION

The ALJ's factual findings can be summarized as follows. Complainant, who is of Chinese descent, lives with her fiancé, who is of Jamaican descent. Their son is of Jamaican and Chinese descent. He was four years old when Complainant began working for Dane in February 2008. (ID 10.)[2] Beginning in May 2008, Complainant heard Buckley use racial epithets in the office. Her testimony described five specific incidents: (a) Buckley referred to a client as "this fucking Jamaican nigger." Ibid.; (b) Buckley referred to an African-American employee (who was not present) as "crazy nigger." (ID 10-11.); Buckley said, "you fuckin' nigger" to the Office Manager, David Gorman, and Gorman replied, "you fuckin' white nigger." (ID 11.); (d) Buckley referred to

---

[1] The complaint was amended to add the DCR Director as a complainant. However, for purposes of this determination and order, "Complainant" will refer to Shi-Juan Lin and/or the deputy attorney general (DAG) who prosecuted the case and filed post-hearing submissions.

[2] For purposes of this decision, "ID" refers to the ALJ's initial decision. "1Tr." and "2Tr." refer to the transcripts of the November 2, 2011, and February 2, 2012, hearing dates. "CE" and "RE" refer to Complainant's and Respondents' exceptions and replies to the initial decision. "Ex. C" and "Ex. R" refer to Complainant's and Respondents' exhibits admitted into evidence at the hearing. "C-PH Brief" and "R-PH Brief" refer to Complainant's and Respondents' post-hearing briefs submitted to the ALJ.

his lawyer by saying, "[T]his fucking nigger, I pay him all this money and he just sits there and do [sic] nothing." Ibid.; and (e) Buckley said, "That's just how - - the nigger way." Complainant did not know what he was referring to. Ibid.

Complainant believed that Buckley used the word "nigger" in his everyday conversation without thinking, and without thinking it was offending her. Ibid. Buckley or another employee told Complainant that her jeans looked nice on her "oriental ass." (ID 11.) The ALJ wrote that Lin thought Buckley made the remark and "wanted to smack him and did not know what to do." (ID 4.)

Buckley met Complainant's son and treated him to ice cream. (ID 10.) Her son once spent the day in the office when school was closed. Buckley did not use racial epithets in his presence or in the presence of any of Complainant's other family members. (ID 11.) Complainant resigned in June 2008, the same day that her son finished school for the year. Ibid. Complainant was then unemployed for fifteen months. She received unemployment benefits and volunteered at her son's school. She applied for two restaurant jobs. Ibid.

The ALJ concluded that Complainant was not subjected to a hostile work environment as defined by the LAD. (ID 12-21.) Citing the four-pronged test articulated in Taylor v. Metzger, 152 N.J. 490, 498 (1998), and Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993), the ALJ concluded that the evidence failed to show that the racial slurs (1) would not have occurred but for Complainant's race, or that they (2) were severe or pervasive enough to make (3) a reasonable employee of her race believe that (4) the conditions of employment had been altered and that the working environment had become hostile or abusive. (ID 12.) The ALJ evaluated Buckley's conduct from the perspective of a reasonable Chinese employee. (ID 19.) The ALJ rejected the argument that the racial slurs should be evaluated from the perspective of a reasonable black person or a reasonable person with a black or mixed-race child. (ID 19-21.) The ALJ noted that none of the inappropriate language was directed at Complainant, that she was hired in February but did not hear the first comment until May, and that she testified to "only a handful" of additional incidents before she resigned in June. (ID 21-22.)

The ALJ found that in the absence of a hostile work environment, the evidence could not support a finding of a constructive discharge. (ID 22-23.) The ALJ also found that Complainant's assertion that she had no recourse but to resign was "objectively unreasonable." (ID 23). The ALJ specifically found unreasonable Complainant's concern that her son would be exposed to racial slurs. (ID 23-24.) The ALJ concluded that Complainant may have resigned for reasons unrelated to Buckley's conduct. Citing the timing of her resignation and the extent of her job search and volunteer activities while unemployed, the ALJ found that the circumstances "suggest[ed]" that Complainant resigned so that she could care for her son during the summer, and then volunteer at his school during the school year in exchange for reduced tuition. (ID 24-25, 30.) Based on the above, the ALJ recommended the dismissal of the complaint. (ID 31.)

The ALJ rejected Respondents' application for attorney's fees, noting that the LAD permits a fee award to a respondent only where a complainant has brought a charge in bad faith. N.J.S.A. 10:5-27.1. (ID 25.) The ALJ noted that bad faith in the context of LAD fee awards means a "reckless disregard or purposeful obliviousness of the known facts," and concluded that the circumstances in this case did not rise to that level. (ID 28-30) (citing Michael v. Robert Wood Johnson Univ. Hosp., 398 N.J. Super. 159, 165 (App. Div. 2008)).

THE PARTIES' EXCEPTIONS

Respondents take exception to the ALJ's conclusion that the complaint was not commenced or litigated in bad faith. Respondents contend that the DCR investigator received exculpatory evidence from two former Dane employees after the DCR issued its finding of probable cause. (RE 2-3.) Respondents argue that the investigator should have provided that information to the Director and that her failure to do so deprived them of due process because the finding was not based on a "fully formed factual record." (RE 4.)[3] Respondents also argue, without providing details or

[3] Respondents also note that because the DAG notified them of the additional evidence more than thirty days after the probable cause determination, a motion for reconsideration of the probable cause determination would have been time-barred. (RE 2.)

pointing to specific sections of the ALJ's decision, that the ALJ's factual findings support the conclusion that the complaint was commenced in bad faith. (RE 5.)

Complainant takes exception to the ALJ's failure to make any specific factual finding regarding Buckley's use of the word "nigger" in everyday conversation. Complainant urges the Director to find as fact that he used the word regularly, in addition to the five incidents described at the hearing. (CE 1-2.)

Complainant takes exception to the ALJ's conclusion that she did not meet the but-for standard. She argues that she is the functional equivalent of a black complainant and that the LAD protects her from a racially hostile work environment even where the harassment was not directed at her. Complainant argues, in pertinent part:

> Within the adverse employment context, New Jersey and federal courts have recognized that when a plaintiff suffers adverse employment action due to an interracial relationship, or an interracial child, or association with a minority colleague, she suffered the same injury as a minority and is the "functional equivalent of being a member of the protected group." See O'Lone v. New Jersey Dep't of Corrections, 313 N.J. Super. 249, 255 (App. Div. 1998); Tetro v. Elliot Popham Pontiac Oldsmobile, Buick, and GMC Trucks, Inc., 173 F.3d 988 (6th Cir. 1999) (applying Title VII when a white employee was discharged due to racial animus towards his biracial child); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888 (11th Cir. 1986) (finding Title VII protects a plaintiff who claims discrimination based on an interracial marriage or association); Craig v. Suburban Cablevision, 140 N.J. 623 (1995) (friends and family associated with individual who made sexual harassment complaint also protected against retaliation); Young v. St. James Management, LLC, 749 F.Supp.2d 281, 292 (E.D. Pa. 2010) (parent of a son who was involved in an interracial relationship protected against discrimination). Biological membership in a protected class is not a prerequisite to recovery.
>
> Although these cases focus on adverse employment action rather than hostile work environment, the principle of associational discrimination applies in a hostile work environment context. In a hostile work environment case, a complainant may either assert that she was the target of harassment or that she witnessed conduct that was hostile by virtue of her association with a protected class. See Lehmann, 132 N.J. at 610-611 (a claim of hostile work environment is "reinforced if [the plaintiff] witnesses the harassment of other[s] .") (CE3-4)

Complainant takes exception to the ALJ's conclusion that Buckley's conduct was not sufficiently severe or pervasive to constitute a hostile work environment. Complainant argues that the "severe or pervasive" standard should be measured from the perspective of a reasonable

employee who is part of a black family, and that the egregious nature of the slur, close physical work quarters, and Buckley's absolute authority in the office support the finding of severe and pervasive. (CE 6-7, 2-6 & 9-10.)

Finally, Complainant takes exception to the ALJ's conclusion that she was not constructively discharged. She cites, among other things, her uncontradicted testimony that she did everything she could to get Buckley to stop the racial slurs and ultimately quit because she "could not take it anymore." (CE11.)

DISCUSSION

Except as noted below, the Director concludes that the relevant and material facts relied on by the ALJ are supported by the record, and adopts them as his own. Without disturbing any explicit or implicit credibility determinations of the ALJ, the Director finds as fact that in addition to the five specific racially hostile incidents cited in the ALJ's decision, Complainant heard Buckley use the word "nigger" on other occasions in everyday conversation. The ALJ found that Complainant believed that Buckley used the word in his everyday conversation without thinking, and without thinking it was offending her. (ID11.) The ALJ did not, however, make an explicit finding as to whether Buckley in fact did so. Complainant testified that Buckley "would use the 'N-word' once he's in a rampage . . . " (1Tr. 31-18 to -20), and that whenever he was in the office, it would be in his conversation at least once if he was screaming and yelling. (1Tr. 43-2 to -7; 44-3 to -5.) Buckley admitted using the racial epithet once or possibly twice during the Jamaican comptroller incident and testified that he could have used it on other occasions, but it would have been a "rarity." (2Tr. 30-6 to -16, 37-1 to-10 & 38-2 to-5.)

The ALJ did not explicitly assess Complainant's or Buckley's credibility on this issue. However, in finding that Buckley used the word four additional times in about a month, the ALJ essentially discounted the credibility of Buckley's assertion that his use of the term on other occasions would have been a rarity. Because Complainant's testimony is consistent with her statements to the DCR investigator (2Tr. 111-22 to112-5), and because the ALJ deemed it relevant

to find that Complainant believed that Buckley used the term in everyday conversation, the Director finds that in addition to the five cited incidents, Buckley used the word "nigger" on other occasions in everyday conversation, without thinking, and without thinking it was offending Complainant.

The "clear public policy of this State is to eradicate invidious discrimination from the workplace." Alexander v. Seton Hall, 204 N.J. 219, 228 (2010). To that end, the LAD was enacted as "remedial legislation" to root out the "cancer of discrimination." Hernandez v. Region Nine Housing Corp., 146 N.J. 645, 651-52 (1996). The Legislature declared that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and functions of a free democratic State." N.J.S.A. 10:5-3; see also L.W. v. Toms River, 189 N.J. 381, 399 (2007) (noting "[f]reedom from discrimination is one of the fundamental principles of our society"). Our courts have adhered to the Legislative mandate that the LAD be "liberally construed," N.J.S.A. 10:5-3, by consistently interpreting the LAD "with that high degree of liberality which comports with the preeminent social significance of its purposes and objects." Andersen v. Exxon Co., 89 N.J. 483 (1982).

The LAD's protections are so broad that they are intended to extend beyond the immediate employee in certain instances. In the section of the LAD entitled, "Finding and Declaration of Legislature," the statute states:

> The Legislature further declares its opposition to such practices of discrimination when directed against any person by reason of the race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, liability for service the Armed Forces of the United States, or nationality of that person or that person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and ensured. [N.J.S.A. 10:5-3 (emphasis added)]

Cf. Enriquez v. W. Jersey Health Sys., 342 N.J. Super. 501, 519 (App. Div.) (noting LAD's protections are broader than other anti-discrimination statutes), certif. den'd, 170 N.J. 211 (2001).

Hostile Work Environment

Racial harassment that creates a hostile work environment is a form of discrimination. Taylor, supra, 152 N.J. at 498. To establish a *prima facie* case, an employee must show that the harassment (1) would not have occurred but for his or her race, and (2) was severe or pervasive enough to make a (3) reasonable employee of the same race believe that (4) the conditions of employment have been altered and the working environment is hostile or abusive. Ibid.

a. The First Prong is Met

In this case, the relevant LAD-protected characteristic is not Complainant's own race, but her known close familial association with members of the protected group targeted by Buckley. In O'Lone, supra, the Appellate Division held that a white plaintiff who suffered employment discrimination because he was dating a black woman "suffered the same injury as a minority." 313 N.J. Super. 249 at 255. The court stated that when an employee is wrongfully discharged based on an association with a member of a protected group, "that is the functional equivalent of being a member of the protected group." Ibid. Here, Complainant is a member of a black family. Her fiancé is black. Her son is half-black. She was a member of a black household. She was living with her fiancé's parents who are black. Buckley knew of Complainant's familial association with her black fiancé, his family, and her half-black son. For instance, Lin testified that Buckley remarked, "What is it with you girls and these black guys." (ID 2.) Under the specific circumstances presented here, the Director accepts the argument that she is the functional equivalent of a member of the protected group targeted by Buckley. See O'Lone, supra, 313 N.J. Super. 249; Young, supra, 749 F. Supp.2d 281; cf. Cowher v. Carson & Roberts, 425 N.J. Super. 285 (App. Div. 2012).

The ALJ attempted to distinguish O'Lone by reasoning that the employer in that case discharged the plaintiff based on his relationship with a black woman, while in the present case Buckley did not intentionally discriminate against Complainant because of her black fiancé or son. (ID 14.) The ALJ also relied on Caver v. City of Trenton, 420 F.3d 243, 263 (3rd Cir. 2005), for the

proposition that an aggrieved employee cannot meet the first prong of a hostile work environment claim if the slurs were not directed at her. (ID 12.)

However, the ALJ's interpretation of O'Lone and reliance on Caver run counter to the New Jersey Supreme Court's holding in Lehmann, where the Court held that in a hostile work environment case, "the plaintiff need not personally have been the target of each or any instance of offensive or harassing conduct." Lehmann, supra, 132 N.J. 587, 611 ("Evidence of sexual harassment directed at other women is relevant to both the character of the work environment and its effects on the complainant.")[4] The Court stated, "Even a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere where such harassment was pervasive." Ibid. (citing Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985), aff'd sub nom., Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)). The Court noted that in cases of workplace harassment, "[t]he LAD is not a fault or intent-based statute." Lehmann, supra, 132 N.J. at 604-05. The Court stated:

> A plaintiff need not show that the employer intentionally discriminated or harassed her, or intended to create a hostile work environment. The purpose of the LAD is to eradicate discrimination, whether intentional or unintentional . . . it is at the effects of discrimination that the LAD is aimed. Therefore, the perpetrator's intent is simply not an element of the cause of action. Plaintiff need show only that the harassment would not have occurred but for her sex. [Ibid. (emphasis in original)]

The Lehmann Court also cited the seminal opinion, Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), which held that the same standard applies in hostile work environment claims based on race. In Rogers, the plaintiff was a Spanish-surnamed American who alleged that her employer, an optometry practice, discriminated against her by segregating patients based on race or ethnic origin. 454 F.2d at 236. The employer argued that because "discriminatory treatment or classification of patients is not a practice directed toward any employee

[4] It is settled that where, as here, the New Jersey Supreme Court has established a standard that differs from that applied by federal courts, the Supreme Court standard prevails. Johnson v. Fankell, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."); see also, Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 121, n. 19 (3d Cir. 1999) ("The LAD is a remedial statute, in some respects broader and more flexible than Title VII . . . This is so even though New Jersey often looks to the federal system for interpretive authority."); Viscik v. Fowler Equip. Co., 173 N.J. 1, 16 (2002).

. . . [the plaintiff] cannot complain that she is treated any differently than any other employee." Id. at 238. The Court disagreed. It reasoned that Title VII was intended to eradicate "working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." Ibid. Thus, an employer's "failure to direct intentionally any discriminatory treatment towards [the plaintiff] is simply not material to the finding of an unlawful employment practice." Id. at 239.[5]

The requirement that the "conduct would not have occurred but for the employee's gender" must be defined in a way that is consistent the Lehmann Court's instruction that such conduct need not be directed at the plaintiff personally, and that a plaintiff need not show that the employer intentionally harassed her or intended to create a hostile work environment. Thus, in a setting where sexist or sexual comments were all directed at women other than the complainant, the first prong does not turn on who triggered the offensive conduct, but instead looks at whether it is the shared LAD-protected characteristic that makes the conduct harassing to the complainant. "But for her gender" means merely that the female gender is what renders it harassing. The Lehmann Court noted that when "harassing conduct is sexual or sexist in nature, the but-for element will automatically be satisfied." 132 N.J. at 605. It follows that in a racial harassment case, where the harassing conduct is racial or racist in nature, the but-for element will automatically be satisfied as well. Where, as here, the word "nigger" is repeatedly used in the workplace, it meets the but-for standard because it expresses a specific racial bias. The fact that the actor was not directing the remarks at Complainant is immaterial.

None of the New Jersey opinions cited by the ALJ holds that an employee cannot meet the but-for element without showing conduct directed at the complainant. None requires a complainant to show a tangible employment action to prevail in a hostile work environment claim. They could not do so without offending the Court's holding in Lehmann; see also Taylor, supra, 152 N.J. at 507

[5] Cf. Burlington Indus. v. Ellerth, 524 U.S. 742, 767 (1998) (Thomas, J., joined by Scalia, J. dissenting) (describing Rogers as a "landmark case").

(noting "a loss of a tangible job benefit is not necessary since the harassment itself affects the terms or conditions of employment."). Here, Buckley's slurs were inescapably racist. The Director is mindful that the LAD is not intended to be a general civility code. However, under the particular circumstances presented here, where the Complainant is so strongly associated with the targeted protected group, the actor is well aware of that close association, and the workplace is polluted with discrimination, the Director is satisfied that the but-for requirement is met.

b. Complainant Met the Remaining Prongs

In rejecting Complainant's claim of a hostile work environment, the ALJ found that a reasonable person of Chinese descent would not have deemed the conduct to be severe or pervasive enough to render the work environment hostile or abusive. (ID 18.) However, the ALJ misapplied the reasonable person standard. Here, the conduct at issue must be gauged from the perspective of a reasonable black employee or the functional equivalent of a member of the targeted protected group. See Cowher, supra, 425 N.J. Super. 285, 300.

In Cowher, a non-Jewish plaintiff brought a hostile work environment claim based on anti-Semitic slurs. The Appellate Division held that in evaluating whether the bias-based harassment was sufficiently severe or pervasive to create a hostile work environment, the conduct is evaluated from the perspective of a reasonable Jewish employee, rather than a reasonable person of the plaintiff's actual background. Ibid. Citing Lehmann, the court noted that the subjective effect on a particular plaintiff plays no role in determining whether the allegedly harassing conduct violates the LAD. Ibid. Accordingly, the Cowher court reversed the trial court's grant of summary judgment to the employer. Id. at 302.

The ALJ attempted to distinguish Cowher by reasoning that the bad actors in that case perceived the plaintiff to be Jewish, while in this case there is no allegation that Buckley mistakenly believed Complainant to be black. (ID 19.) Focusing on the actor's state of mind disregards the Supreme Court's instruction that "intent is simply not an element" in hostile work environment cases. Lehmann, supra, 132 N.J. 587, 605; see also Cutler v. Dorn,196 N.J. 419, 431 (2009)

("[N]either a plaintiff's subjective response . . . nor a defendant's subjective intent when perpetuating the harassment . . . is controlling of whether an actionable hostile work environment claim exists."). In addition, the Lehmann Court held that an employee may prevail on a hostile work environment claim even where all of the bias-based comments were directed at others. Id. at 611. Interpreting the Appellate Division's rulings in O'Lone and Cowher consistent with Lehmann, and in keeping with the oft-stated principle that the LAD is meant to be broadly interpreted to further its compelling societal goals, there is simply no basis to restrict Cowher to situations in which the harasser mistakenly perceived the victim to be a member of a protected group. Here, the harasser knew about Complainant's familial association and still engaged in the offending conduct.

The remaining question is whether Buckley's racial slurs were sufficiently severe or pervasive. The ALJ found that Buckley used the word "nigger" on five separate occasions within about a month. (ID10-11, 22.) While making abundantly clear that she did not condone such racial epithets, the ALJ characterized the remarks as merely inappropriate offhand comments and isolated incidents that were not severe or pervasive enough to create a racially hostile work environment. (ID 21-22.)

In Taylor, the Supreme Court held that even a single racial slur ("jungle bunny") directed to a subordinate could be severe enough to create a hostile work environment. 152 N.J. at 506-07. The Court stated that a supervisor's "unique role in shaping the work environment," id. at 503, gives him or her ample power to contaminate the workplace and alter the terms and conditions of a subordinate's employment, and that racial epithets are "especially egregious" forms of harassment. Id. at 502. Although the word "nigger" was not used in Taylor, the Court used it as a point of comparison when evaluating the impact of the term "jungle bunny," noting that both are unambiguously racist. Id. at 502. The Court stated, "The use of the word 'nigger' automatically separates the person addressed from every non-black person; this is discrimination per se . . ." Id. at 502 (quoting Bailey v. Binyon, 583 F. Supp. 923, 927 (N.D. Ill. 1984)). The Court added that the experience of being called a "nigger . . . is like receiving a slap in the face. The injury is

instantaneous." Id. at 503 (quoting Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431, 452 (1990)). The Court wrote that the severity of a racial epithet is "exacerbated" when it is "uttered by a supervisor." 152 N.J. 490, 503. Indeed, as the Taylor Court recognized, "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." Id. at 506 (quoting Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir.1993)).

In view of the Taylor Court's guidance regarding the unique impact of a supervisor's use of such an opprobrious racial epithet in the presence of subordinates, Buckley's conduct may have been severe enough to create a racially hostile work environment based only on a single incident. But it was not just a single incident. The ALJ found that Buckley used the term on five separate occasions in about a month. And Complainant testified (and the Director has found as fact) that Buckley also used the term in general conversation and did not stop even after she twice reminded him why she found it offensive. (1Tr. 44-10 to -13.) To borrow from Taylor, Buckley "did more than merely allow racial harassment to occur at the workplace, he perpetrated it." Id. at 504. That "circumstance, coupled with the stark racist meaning of the remark[s], immeasurably increased [their] severity." Ibid.

Constructive Discharge

To establish a constructive discharge, an employee must show that the conduct was not merely severe or pervasive, but made the workplace so intolerable that a reasonable person would be compelled to resign. Shepherd v. Hunterdon Dev. Ctr., 174 N.J. 1, 28 (2002). However, "an employee has the obligation to do what is necessary and reasonable in order to remain employed rather than simply quit." Ibid. In applying the reasonable person test, factors to be considered include "the nature of the harassment, the closeness of the working relationship between the harasser and the victim, whether the employee resorted to internal grievance procedures, the

responsiveness of the employer to the employee's complaints, and all other relevant circumstances." Ibid. (citing Woods-Pirozzi v. Nabisco, 290 N.J. Super. 252, 276 (App. Div. 1996)).

Here, Buckley's repeated use of the racial slur in a short time period, in both angry rants and more casual conversation, cannot be characterized as anything but egregious. Lin testified that when Buckley used the slur, it felt like he was stabbing her. (1Tr. 36-11 to-16.) She testified that it was particularly hurtful to hear him use the term "Jamaican nigger" in the workplace because her son, who was half Jamaican, was a "part of her." (ID 3). She testified that she told her fiancé and her friend about the racially charged workplace and both were offended. (ID 3.) Buckley was the owner of the company with unfettered authority to hire and fire Complainant. They worked in close proximity in a small house-turned-office at least four days a week. (1Tr. 43-23 to 44-2.) The only other person working regularly in the house was the office manager, Gorman. Complainant used all the internal grievance procedures available to her. She twice complained directly to Buckley and twice complained to Gorman, but nothing changed. (1Tr. 44-10 to -13.) In response, Gorman told her "that's the way [Buckley] is" (1Tr. 32-15 to -16 & 37-11 to -14), and Buckley merely told her that his use of the racial epithet did not refer to her or her family. (2Tr. 35-23 to -25.) No one else in the company had authority to address Complainant's problem. (2Tr. 43-18.) Buckley acknowledged, "The buck kind of stopped there with me." Ibid. It is difficult to fathom what else she could have done to stem the tide of racial hostility. With no further avenues available to stop the racial slurs, a reasonable employee in her circumstances working in close quarters with a boss who uses the racial slur freely and with impunity and an immediate supervisor who refuses to intervene, might well feel compelled to resign rather than endure the continuing racial hostility.

In rejecting the claim of constructive discharge, the ALJ relied in part on testimony regarding the circumstances of her resignation. Citing Shepherd, supra, where the plaintiff contemplated retiring more than a year before the events comprising his allegations of constructive discharge, the ALJ concluded that because Complainant's last workday with Dane was also her son's last day of school for the year, the evidence "suggest[ed]" that Complainant resigned for reasons unrelated

to Buckley's conduct. (ID 24-25.) However, there was no evidence that before Complainant tendered her resignation, she contemplated leaving the workforce. Rather, the uncontradicted testimony was that she endured the workplace as long as she did because she needed the job and believed that her only options were to quit or endure the caustic environment because Buckley and Gorman made it clear that Buckley's conduct would not change. (1Tr. 50-8 to 51-10; 1Tr. 44-10 to -18.) As a mother of a bi-racial son, she was sensitive to such conduct and took reasonable steps to stop Buckley's racial slurs, both by asking him directly and asking the office manager to intervene. The uncontradicted evidence, much of which was corroborated by her fiancé and his sister, is that Complainant experienced emotional and physical symptoms because of the workplace stress such as crying spells, hives, and weight loss, before deciding that she had no choice but to leave. (1Tr. 42-22 to 43-1, 51-17 to -21, 85-3 to -8, 85-16 to -22, 87-22 to 88-8, 93-12 to 94-9.)

The extent of Complainant's subsequent job search is relevant to mitigation of damages, discussed below. However, in light of the fact that a reasonable person in her circumstances would have found the work environment to be intolerable, and where Complainant had no further alternatives to alleviate the hostility, the timing of Complainant's resignation and her subsequent employment/volunteer activities are insufficient to show that Complainant resigned for reasons unrelated to the workplace harassment.[6] The record supports a finding of constructive discharge.

Dane's Liability

An employer will be liable for compensatory damages for a hostile work environment when the employer (1) grants a supervisor authority to control the workplace and the supervisor abuses that authority to create a hostile environment; (2) negligently manages the workplace by failing to enact anti-harassment policies and mechanisms; or (3) has actual or constructive knowledge of the

[6] The record here is unlike the facts in Shepherd, supra, where the Court found that by avoiding "a critical counseling session called by the superintendent to discuss the very issues raised by his internal complaint," an employee failed to do "all that was reasonably necessary to remain employed." 174 N.J. at 29.

harassment and fails to take effective measures to end the discrimination. Lehmann, supra, 132 N.J. at 622-23. The Court wrote:

> When an employer knows or should know of the harassment and fails to take effective measures to stop it, the employer has joined with the harasser in making the working environment hostile. The employer, by failing to take action, sends the harassed employee the message that the harassment is acceptable and that the management supports the harasser. "Effective" remedial measures are those reasonably calculated to end the harassment. The "reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment."

Id. at 622. (quoting Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991)).

Here, Buckley testified that "the buck kind of stopped" with him since there was no one above him. (2Tr. 43-18 to -19.) He had supervisory authority over Complainant, Gorman, and any other employee who came into the office. He had complete control of the work environment and his exercise of authority created a racially hostile work environment. The discharge of an employee, including a constructive discharge, is an employer's deliberate act and, therefore, the employer is liable for damages flowing from any termination of employment found to be wrongful. See Entrot v. BASF Corp., 359 N.J. Super. 162, 192 (App. Div. 2003). Thus, Dane is liable for Buckley's racially hostile conduct and all damages flowing from the constructive discharge.

Buckley's Individual Liability

Any person may be held individually liable for aiding and abetting an employer's unlawful discrimination. N.J.S.A. 10:5-12e. A supervisory employee can be held liable for aiding and abetting the employer's LAD violations if the supervisor "actively engaged in discriminatory conduct, gave substantial assistance to or encouragement in maintaining a hostile work environment, or was deliberately indifferent to the complaints of plaintiff." Herman v. The Coastal Corp., 348 N.J. Super. 1, 28 (App. Div. 2002). Here, Buckley was responsible for practically every statement or action that created the hostile work environment. His misconduct also infected the work environment as a whole--it triggered Gorman's use of the term "white nigger," (1Tr. 33-1 to -4), and, for instance, set the stage for the "oriental ass" remark. (1Tr. 48-14 to -15, ID 11.) It was Buckley's own conduct

that elevated the racially hostile work environment to the intolerable level of a constructive discharge. Based on his active role in the conduct, Buckley is individually liable under the LAD.

Remedies

a. Pain and Humiliation Damages

LAD plaintiffs are entitled to recover non-economic losses such as mental anguish or emotional distress. Anderson v. Exxon Co., 89 N.J. 483, 502-03 (1982). They are entitled to receive, at a minimum, a threshold pain and humiliation award for enduring the "indignity" that may be presumed to be the "natural and proximate" result of discrimination. Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 312-13, 317 (Ch. Div. 1970). Pain and humiliation awards are not limited to instances where the plaintiff sought medical treatment or exhibited severe manifestations. Id. at 318. Nor is expert testimony required. Rendine v. Pantzer, 276 N.J. Super. 398, 440 (App. Div. 1994), aff'd as modified, 141 N.J. 292 (1995). Such awards are within the Director's discretion because they further the LAD's objective to make a complainant whole. Anderson, supra, 89 N.J. at 502; Goodman v. London Metals Exchange, 86 N.J. 19, 35 (1981).

Neither Complainant nor the DAG suggested a specific amount of compensation for pain and humiliation. Complainant testified that when Buckley use the word "nigger,"she felt like she was being stabbed (1Tr. 36-12), and that she cried at work, lost sleep, broke out in hives, snapped at her son, and became angry and depressed. (1Tr. 42-14 to -25 & 44-22 to-24.) Her fiancé and his sister corroborated that testimony. (1Tr. 87-22 to 88-8 & 93-12 to 94-25.)

As noted above, the fact that Complainant is not black but endured a hostile work environment as a member of a black family, may be relevant in assessing the impact of the hostile conduct on Complainant in the particular circumstances of this case. Considering this factor, as well as the ALJ's factual findings regarding the conduct, and the uncontradicted testimony regarding Complainant's physical and emotional reactions to the racial slurs, the Director awards Complainant $25,000 in pain and humiliation damages. In reaching this determination, the Director

has also considered awards made to other prevailing complainants. Dane and Buckley are jointly and severably liable for those damages.

b. Back Pay

The Director has the discretion to award such relief that in his judgment will effectuate the purpose of the LAD. N.J.S.A. 10:5-17. Back pay is designed to reimburse the complainant for financial losses caused by the discriminatory conduct. Goodman, supra, 86 N.J. at 34-35. However, a discharged employee is obliged to exercise reasonable diligence in seeking other suitable employment. Id. at 35 ("Mitigation principles encourage the unemployed to seek employment, a socially desirable goal."). Since an unemployed person has available time that may be used "profitably," back pay may be reduced if he fails to "exercise reasonable diligence in seeking other suitable available positions." Id. at 34-35. Moreover, with the passage of time, circumstances may dictate that a plaintiff "lower his sights and accept employment with lower pay, with different work, or a more distant location." Id. at 38.

In this case, Complainant was unemployed for approximately fifteen months (i.e., from June 13, 2008, through September 14, 2009) until securing a position in the after-school program at her son's school. (1Tr. 54-25; 55-14 to -16; 62-24 to 63-2.) She had no income when her employment with Dane ended. A few weeks later, she learned that she might be eligible for unemployment compensation, and collected unemployment benefits. (1Tr. 53-8 to -13 & 67-1 to -3.)

She applied for only two jobs, i.e., restaurants in Woodbridge and East Brunswick. (1Tr. 54-3 to -11, 68-14 to -17.) She testified that while not actually applying for other jobs, she "looked around." (1Tr. 68-19 to -20.) She inquired about a retail job in North Brunswick but nothing was available (1Tr. 54-15 to-20) and tried selling Amway vitamins but was unsuccessful. (1Tr. 82-19 to 83-1; 72-3 to 73-11.) She volunteered at her son's school, performing 88 hours of yard duty during the 2008-09 school year. (Ex. R-1.) Each family was expected to do 35 hours of yard duty; the school collected an annual payment from each family to cover that obligation and refunded that payment when the family completed the 35 hours. (Ex. P-3, P-4.) She was not paid for her

volunteer hours. (Ex. P-3.) She testified that she performed other types of volunteer work at the school because she was grateful that the pastor reduced her tuition by $300 a month based on financial need while she was unemployed. She "would stay at the school every day pretty much," helping the principal, teachers, and assisting with the lunch program. (Ex.P-4, 1Tr. 63-6 to 64-9.)

Failure to mitigate is an affirmative defense; the employer bears the burden of proving that mitigation was feasible. Goodman, supra, at 40. The employer establishes a *prima facie* case of failure to mitigate by showing that comparable or suitable employment opportunities were available. Id. at 41. Here, Respondents point to Complainant's testimony that she applied for only two jobs, but they have presented no evidence of any comparable or suitable jobs that were available during Complainant's period of unemployment. (R.PHBrief at 5-6.) Under the Goodman standard, this would not constitute a *prima facie* showing that Complainant failed to mitigate damages.

Still, the Director is reluctant to conclude that the evidence presented by Complainant meets even a threshold showing of reasonable diligence in seeking substitute employment. If a litigant had good reasons for actually submitting only a few job applications, alternate evidence about the employee's job search may show reasonable diligence. For example, testimony about prospective employers or employment agencies contacted, daily or weekly job search activities, and the employee's job search strategies might suffice. Here, there is insufficient evidence in the record to show that Complainant engaged in more than a sporadic job search.

Based on the limited scope of her job search during her fifteen months of unemployment, the Director finds that once Complainant became eligible for unemployment compensation, she essentially removed herself from the labor market during the period in which she was unemployed. Although that might have been a reasonable personal decision based on the availability of unemployment compensation, the location of her son's school and other family circumstances, it is insufficient to show that she made reasonable efforts to use her time "profitably."

Complainant contends that she was constructively discharged at the height of the 2008 recession and points to Bureau of Labor Statistics data regarding the average number of weeks of unemployment during the relevant time period. (C-PHBrief at 22.) That type of evidence might be relevant to bolster a complainant's testimony regarding the difficulties encountered in finding employment, but such statistics alone cannot provide a blanket justification for any litigant's failure to secure employment during the recession. Without evidence that Complainant engaged in a continuing job search over the fifteen months of her unemployment, the argument regarding the overall economic climate at the time is insufficient to show reasonable diligence.

Although it is true that the employer generally bears the burden of proof regarding an employee's failure to mitigate damages, it is also true the Director has the discretion to assess such remedies as in his judgment will effectuate the purposes of the LAD. In view of Complainant's own testimony showing that she engaged in almost no job search during her fifteen months of unemployment, the Director concludes that imposing a back pay obligation on Respondents in this case would not further the purposes of the LAD. This is the exception rather than the rule, and should not be construed as changing the burdens of proof regarding back pay in administrative proceedings under the LAD. To the contrary, employers are reminded of their continuing obligation to bear the burden of proving failure to mitigate in accordance with the Goodman standards.

c. Statutory Penalty

The LAD states that any person who violates any of its provisions "shall" be liable, in addition to any other remedies, for certain statutory penalties payable to the State Treasury. N.J.S.A. 10:5-14.1a. The maximum penalty for a first violation of the LAD is $10,000. Ibid. Here, the Director concludes that a penalty of $5,000 is appropriate. Because punitive damages cannot be awarded in LAD actions filed administratively, the civil penalty serves an admonitory or deterrent purpose in this case. The egregious circumstances of this case warrant a significant penalty in the public interest for which Dane and Buckley are jointly and severably liable.

d. Attorney's Fees

A prevailing party in a LAD action, including an attorney prosecuting a case for DCR, may be awarded reasonable attorney's fees and costs. N.J.S.A. 10:5-27.1. Fees should ordinarily be awarded unless special circumstances would make a fee award unjust. Hunter v. Trenton Housing Auth., 304 N.J. Super. 70, 74-75 (App. Div. 1997). A claim must be supported by a certification of services that is sufficiently detailed to allow meaningful review and scrutiny, and include more than a raw compilation of hours. Rendine, supra, 141 N.J. at 334-35.

Here, an award of attorney's fees for prosecuting the case serves the public interest. The record will be left open for thirty days to allow the parties to amicably resolve the issues regarding attorney's fees and costs or, if that is not possible, submit briefs and/or certifications addressing the fee award. The DAG shall file with the DCR and serve on Respondents any submissions within twenty days. Respondents shall have ten days to file and serve a reply.

e. Respondents' Application for Attorney's Fees

Respondents argue that the DCR proceeded with the hearing in bad faith because it obtained additional evidence after the Director issued a finding of probable cause but did not forward same to the Director for a reassessment of the probable cause determination or produce the evidence to Respondents before the first hearing date. (ID 25, 29.) In particular, Respondents point to the DCR investigator's notes from telephone interviews with former Dane employees Jim Davis and Bernie Nodes. The investigator testified that after the probable cause determination was issued, the DAG asked her to interview Nodes and Davis. (ID 25-26.) Davis told the investigator that he was not in the office frequently but "guessed" that he heard Buckley use inappropriate language. (ID 29.) In a separate interview, Nodes stated that he never heard Buckley use inappropriate language but explained that he was rarely in the office. (ID 27, 29.)

Before the first hearing date, the DAG notified Respondents that DCR had interviewed Nodes and Davis by telephone. The DAG provided a copy of the investigator's notes of the Davis

interview and informed Respondents that DCR could not find any record of the Nodes interview. (ID 7, Exh. R-4.) Thereafter, the DCR located the investigator's notes from the Nodes interview and the DAG provided same to Respondents before the second hearing date. (ID 26, 30.)

The investigator testified that Nodes' information was not entirely consistent with information from other witnesses. (ID 27.) However, the ALJ noted that the investigator "aptly explained" that the information from Nodes and Davis showed only that they were not present to witness certain conduct that others may have witnessed. (ID 29.) Thus, the ALJ concluded that the additional information would not necessarily have changed the finding of probable cause. Ibid.

The Director notes that a prosecuting attorney typically gathers additional information in preparation for a hearing after the Director has issued a finding of probable cause. The OAL regulations specifically permit parties to engage in discovery. N.J.A.C. 1:1-10.2. Moreover, the ALJ's factual findings dispel any suggestion that the information provided by Nodes and Davis was somehow exculpatory. The Director's probable cause finding is merely a threshold determination. The ALJ relied on testimony and her own credibility determinations to find as fact that Buckley used the slur at issue in five separate incidents. (ID 10-11.) In addition, Buckley admitted at the hearing that he used the slur during the Jamaican comptroller incident. (2Tr. 25-1 to -11.)

Lastly, the DCR's failure to re-assess the probable cause determination based on the Davis and Nodes interviews does not show "a reckless disregard or purposeful obliviousness of the known facts." Michael, supra, 398 N.J. Super. at 165. As the ALJ held, there is no basis for a finding of bad faith or an award of attorney's fees to Respondents. N.J.S.A. 10:5-27.1.

ORDER

For the reasons discussed above, the Director concludes that Respondents subjected Shi-Juan Lin to a hostile work environment and constructively discharged her, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, and orders as follows:

1. Respondents and their agents, employees, and assigns shall cease and desist from doing any act prohibited by the LAD.

2. Within 45 days from the issuance of the final order in this matter, Respondents shall forward to the DCR a certified check payable to Complainant in the amount of $25,000 as compensatory damages.

3. Within 45 days from the issuance of the final order in this matter, Respondents shall forward to the DCR a certified check payable to "Treasurer, State of New Jersey," in the amount of $5,000 as a statutory penalty.

4. The penalty and all payments to be made by Respondents under this order shall be forwarded to Robert Siconolfi, NJ Division on Civil Rights, P.O. Box 46001, Newark, NJ 07102.

5. Any late payments will be subject to post-judgment interest calculated as prescribed by the Rules Governing the Courts of New Jersey, from the due date until such time payment is received by the DCR.

6. The record in this matter shall remain open for 30 days for the limited purpose of calculating amounts due for counsel fees. If the parties cannot agree on the amount due, the DAG shall file with the DCR and serve on Respondents, within 20 days of this order, a detailed certification of time expended. Respondents shall have 10 days to file and serve a reply.

DATE: 5-6-13

CRAIG SASHIHARA, DIRECTOR
NJ DIVISION ON CIVIL RIGHTS