PUSHED TO THE LIMIT

Are There Any Theories of Liability that LAD Will Not Permit?

By Cindy Flanagan and Matthew Parker

The 1958 classic movie *The Blob* features an amorphous entity that continues to expand until it envelops everything in sight. The New Jersey Law Against Discrimination appears be the blob's statutory equivalent: malleable, amorphous, and continuing to expand to include novel theories of liability pertaining to alleged workplace discrimination. Whether the LAD's continued expansion serves to eradicate discrimination in the workplace, or simply shoulders New Jersey employers with undue costs and burdens in having to defend against such claims, remains unanswered. However, the aggressive expansion of the LAD by New Jersey courts establishes that employers in New Jersey must make appropriate changes to their workplace policies to appropriately mitigate the risks arising from these novel theories of liability.

Enacted in 1945, the NJLAD is remedial legislation which prohibits discrimination and harassment based on actual or perceived race, religion, national origin, gender, sexual orientation, gender identity or expression, disability, and other protected characteristics, including age.[1] The NJLAD's goal is "nothing less than the eradication of the cancer of discrimination."[2] To assist in the accomplishment of this goal, the statute permits successful plaintiffs to recover compensatory damages (including back pay, front pay, and emotional distress damages), punitive dam-

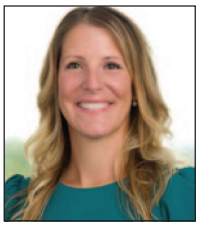
ages, and reasonable attorneys' fees.[3] Based on the damages available to an LAD plaintiff, defending against an LAD claim is a risky and costly endeavor for employers. Accordingly, many employers seek to mitigate such risks by settling those claims that survive, or could survive, a motion for summary judgment. Two cases recently decided by New Jersey courts will make defeating claims at the summary judgment stage even harder for employers.

Meade v. Township of Livingston featured an expansion of the LAD to permit claims based on discriminatory conduct toward an employee by that employee's subordinate.[4] *Meade* concerned a claim by a township manager against the town's board for her termination. The plaintiff's termination had resulted from her continued conflict with the town's chief of police, who was her subordinate. While the plaintiff had exclusive authority to fire the police chief, she could only do so for cause. In 2016, the town's board ultimately terminated the plaintiff because of her performance issues; namely her inability to supervise the chief. Prior to the plaintiff's termination, one member of the town had remarked that the chief's conduct may have been partially driven by his displeasure about reporting to a woman. The plaintiff asserted she was terminated based on her gender to "appease the sexist male Police Chief." Based on such claims, the trial court granted summary judgment in favor of the township, and the Appellate Division affirmed.

On review, the state Supreme Court considered whether discriminatory conduct toward an employee by that employee's subordinate could result in liability on the part of the employer under the LAD. Previously this had not been considered a viable theory of liability for recovery under the LAD as it was "upside down" to contend that the allegedly sexist refusal of the subordinate to yield to their supervisor makes the decision to terminate the supervisor's employment discriminatory.[5] However, the Supreme Court did not agree with this position. Instead, the Court held that the plaintiff asserted a viable theory of liability and that a reasonable jury could conclude that the performance issues which the plaintiff's supervisors cited as the reason for her termination were merely pretextual and that the plaintiff's gender played a role in the termination of her employment.

While *Meade* has not yet been subjected to much further analysis by New Jersey's lower courts, the conclusion after *Meade* is liability under the LAD can now arise if a plaintiff employee's subordinate holds discriminatory animus, the subordinate's actions or conduct contributes to the decision to terminate the plaintiff employee, and the plaintiff employee's supervisor is aware of the subordinate's animus when the decision to terminate the plaintiff is made. While there may not be a significant number of cases that immediately fits within this factual paradigm, allowing liability in these instances considerably expands the scope of the LAD. Indeed, after *Meade*, an employer need not only remain vigilant for potentially hostile words or actions by an individual's supervisor but must also remain vigilant about potentially hostile words or actions by subordinate employees. This shift will require additional time, training and resources to be expended by employers to ensure that adequate processes and procedures are in place to deal with this novel liability. Accordingly, the compliance costs for employers in the wake of *Meade* could be significant.

Further expansion of the LAD may be likely after the recent Appellate Division decision in *Morris v. Rutgers-Newark University*.[6] While *Morris* concerned a hostile educational environment claim under the LAD, a hostile educational environment claim is similar to a hostile work environment claim and uses the same burden shifting framework. In *Morris*, the Appellate Division affirmatively found that a hostile environment can be formed in the mind of one member of a protected class even if the event or events that gave rise to that belief were directly experienced by another. In other words, the *Morris* court held that inappropriate or hostile comment to one individual could be taken as hostility toward all similarly situated individuals. Thus, hostile words or actions against one member of a protected class can serve as the basis of a claim for liability by other members of the class, even if the litigant member did not directly hear or experience the



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allegedly hostile words or actions.

As the Appellate Division decided *Morris* in relation to a hostile education claim and placed significant focus on the small, closely knit nature of a basketball team, courts should not be inclined to extend this holding into the workplace. While words like "team" and "teammate" may be thrown around in relation to the workplace, an athletic team and a workplace are different environments. Teammates win and lose in tandem; they spend hours in close proximity training together, learning to rely on one another, and helping one another hone their respective athletic prowess. Workplaces are not an athletic field, and employees do not have the same uniquely shared bond as teammates. Accordingly, while the Appellate Division may have been willing to find that inappropriate or hostile comment to one individual could be taken as hostility toward all similarly situated individuals regarding a hostile education environment claim raised by athletic teammates, courts must pause before doing so in relation to coworkers.

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If the holding in *Morris* were extended to employers in New Jersey, the effects could prove financially devastating. Under the reasoning in *Morris*, employers could be subjected to lawsuits from multiple plaintiffs for allegedly hostile words or actions that were not even directed at, or experienced by, all litigants. Accordingly, even if settlement is reached with the individual to whom the hostile words and/or actions were directed, further litigation could follow by similarly protected employees who did not directly hear or experience the subject hostility.

Like the blob, the LAD cannot continue to expand in an unconstrained and unlimited fashion. At a certain point, New Jersey courts must be prepared to find that not every theory of liability can support a claim for recovery under the LAD. In the contemporary economy where stability is an invaluable commodity, New Jersey employers are being subjected to an increasingly uncertain legal environment caused by the continued expansion of the LAD. While the expansion of the LAD is a worthy undertaking insofar as it seeks to stamp out the cancer of discrimination, these efforts must be balanced against the economics of increased compliance costs, increased insurance premiums, increased trainings, and increased litigation costs. In medicine, the aggressiveness of treatment must be balanced against the effects such treatment will have on patients. Likewise, in rooting out discrimination in the workplace, courts must recognize that permitting any theory of liability to potentially support an LAD claim will, at a certain point, prove to be unduly burdensome to employers without providing any commensurate benefit to employees. Accordingly, while the theory of liability underlying *Meade* has been adopted by the Supreme Court and is now considered good law in relation to hostile workplace claims, courts must proceed carefully in permitting the theory of liability espoused in *Morris* to be extended to hostile workplace claims. ■

Endnotes

1. *See N.J.S.A.* 10:5-1 et seq.
2. *Fuchilla v. Layman,* 109 N.J. 319, 334 (1988)
3. *See N.J.S.A.* 10:5-1 et seq.
4. *Meade v. Twp. of Livingston*, 249 N.J. 310, 316 (2021)
5. *Meade v. Twp. of Livingston*, No. A-4108-18T1, 2020 N.J. Super. Unpub. LEXIS 2167, at *1 (App. Div. Nov. 12, 2020).
6. *Morris v. Rutgers-Newark Univ.,* 472 N.J. Super. 335, 352 (App. Div. 2022)