STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 00760-00S;
CRT 00761-00S
DCR DOCKET NOS. EC03RB-38041;
EC03RB-38042 (CONSOLIDATED)
DECIDED: June 14, 2002

MARGARET ALLEN, **Complainant,** **v.** **PRINCE SPORTS GROUP, INC.,** **Respondent,**	**ADMINISTRATIVE ACTION**
STEPHANIE MELTON, **Complainant,** **v.** **PRINCE SPORTS GROUP, INC.,** **Respondent.**	**FINDINGS, DETERMINATION AND ORDER**

APPEARANCES:

Ann Marie Kelly, Deputy Attorney General, for the complainants (David Samson, Attorney General of New Jersey, attorney).

Jennifer Morris-Cohen, Esq., and Elizabeth Boyan, Esq., for the respondent (Proskauer Rose, attorneys).

BY THE DIRECTOR:

I. INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights

(Division) pursuant to verified complaints filed by the complainants, Margaret Allen and Stephanie Melton (Complainants), on July 6, 1994, in which each Complainant charged that the respondent, Prince Sports Group, Inc.(Respondent), subjected them to unlawful employment discrimination because of their race (Black) in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to 49. On January 24, 2002, the Honorable Jeff S. Masin, Acting Chief Administrative Law Judge (ALJ), issued an initial decision granting Respondent's motion to dismiss the complaints.[1] For the following reasons, the Director rejects the ALJ's initial decision dismissing the complaints and remands this case for further proceedings consistent with the legal standards set forth herein.

II. PROCEDURAL HISTORY

This matter arose on June 6, 1994, when Complainants filed individual verified complaints alleging, among other things, that throughout their time as temporary workers at Respondent's facility, Respondent refused to offer them permanent positions and subsequently terminated their employment because of their race. Complainants additionally charged that Respondent subjected them and three other Black workers to hostile work environment racial harassment. Respondent filed an answer to the verified complaint denying all allegations of discrimination. The Division investigated and issued a determination on April 23, 1997, finding insufficient evidence to support Complainants' charges that Respondent unlawfully denied them permanent positions and unlawfully terminated their employment, but finding probable cause to credit Complainants' allegations of hostile work environment racial harassment. The Division transmitted the

[1] "ID" shall refer to the initial decision dated January 24, 2002.

complaints to the Office of Administrative Law (OAL) on February 24, 2000 for an administrative hearing regarding the question of unlawful harassment. On May 5, 2000, the ALJ issued an order consolidating the complaints and subsequently conducted a hearing on November 28 and 29, 2001. Following the close of Complainants' evidence, Respondent moved to dismiss the charges. The ALJ granted Respondent's motion and issued an initial decision dismissing the complaints on January 24, 2002.

Complainants filed exceptions to the initial decision and Respondent filed a subsequent reply. The Director requested and was granted three extensions of time to file his final order in this matter, moving the deadline for issuing the Director's findings, determination, and order in this matter to July 25, 2002.

III. THE ALJ'S INITIAL DECISION

A. The ALJ's Description of Complainants' Evidence

The ALJ recounted Complainants' testimony on pages 3-4 of the initial decision treating all disputed evidence as resolved in their favor for the limited purpose of considering Respondent's motion to dismiss. The ALJ described Complainants' testimony that they were temporary workers employed by Pomerantz Temporary Agencies and assigned to Respondent's facility in 1994. According to Melton, on May 26, 1994, Margaret Newsome, Complainants' immediate supervisor, asked Complainants and some others to stay to work overtime. Allen could not recall clearly whether she was asked to work beyond her normal shift, but neither Allen nor Melton worked late that day. On the following morning, May 27, 1994, when Complainants and three other African-American temporary workers arrived at work to begin their shift at 7:00 a.m., a co-worker told each of them that they had been terminated (ID 3).

The ALJ further described testimony that at 9:00 a.m. Complainants and the three other temporary workers went as a group to the office of Nancy Hurt, the shipping foreperson who also supervised Complainants' direct supervisor, Margaret Newsome, to determine if, in fact, they had been terminated. Hurt confirmed that she was not satisfied with their work and was terminating their employment. The ALJ noted that there was some evidence that on the day of the incident, Complainants "may have been told at or after 7:00 A.M. that, as they had already come to work that day, they could continue to finish out the day." Ibid. Complainants additionally testified that they then asked Hurt to sign their time sheets to certify the hours they had worked so they could receive their pay from the staffing agency, Pomerantz. Hurt replied that she would sign their time sheets when she was ready, and Complainants and the other temporary workers returned to work.

Approximately two hours later, all five employees returned to Hurt's office and again asked her to sign the time sheets. The ALJ recounted testimony that Hurt replied she was not ready to sign the papers and ripped up the time sheets they had handed her. Allen testified that she was upset at Hurt's actions, and called her a "witch." Ibid. Hurt allegedly "jumped up towards" Allen and shouted, "Get these mother-fucking niggers out of my office!" Ibid. Allen testified that Hurt's comments went out over the loudspeaker and could be heard "by all within range of that device." [2] Ibid.

The ALJ also recounted testimony that Dennis Enriquez, another supervisor, then

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[2] Complainants testified that Hurt purposefully went on the loudspeaker system and called to another supervisor, Dennis Enriquez, "Dennis, come and get these mother-fucking niggers out of my office" and that the loudspeaker system could be heard throughout the warehouse. (See transcript of hearing conducted November 28, 2001, pp. 20-21, 46).

came to the area by Hurt's office and took the five temporary employees to his office. The employees told Enriquez that Hurt had ripped up their time sheet. Enriquez signed a new time sheet and the five immediately left the building. Complainants were paid for a full day of work.

The ALJ recounted testimony that Complainants and the other employees left Hurt's office very upset at her offensive actions and comment. However, they also acknowledged at hearing that they did not complain to Enriquez or to anyone else at Respondent's facility about Hurt's remark. The ALJ noted that Complainants also testified that they would have left the building if Hurt had signed their time sheets (ID 4).

B. The ALJ's Conclusions of Law

The ALJ articulated the proper legal standard for evaluating a motion to dismiss. Specifically, the ALJ noted that the decision must turn on whether, accepting as true all evidence which supports the position of the defending party and according that party the benefits of all reasonable inferences arising from that evidence, reasonable minds could differ regarding the sufficiency of evidence to establish a violation of law; if reasonable minds could differ regarding liability, the motion must be denied (ID 4).

The ALJ then determined that Complainants based their charges of hostile environment racial harassment on the events of May 26 and 27, 1994 relating to their termination. More specifically, the ALJ concluded that the sole issue before him was whether Hurt engaged in conduct that violated the LAD's prohibitions of employment discrimination. In analyzing this question, the ALJ relied on the undisputed fact that Complainants understood that Respondent had terminated their employment before Hurt

engaged in the challenged conduct. Specifically, the ALJ ruled that at the time of the alleged harassment, Complainants and the three other terminated employees "were seeking nothing more from Hurt than a signature that, had it been obtained from her, would have resulted, by their own admission, in the five leaving the building" and being no longer employed at Respondent's facility (ID 5). For these reasons, the ALJ concluded that once Hurt confirmed that Complainants' employment was terminated, Complainants' understanding and assessment of their relationship to Respondent had been inalterably changed. Therefore, the ALJ determined that, even taking as true all of Complainants' testimony regarding Hurt's conduct, at the time of the alleged harassment, Complainants no longer perceived her conduct as being part of their work environment. Accordingly, the ALJ determined that although Hurt's alleged remark was patently offensive, the remark was not sufficiently severe to have created for the reasonable African-American in that situation a reasonable belief that his or her conditions of employment had been altered and that his or her work environment had become hostile. Given the ALJ's conclusion that Complainants no longer perceived themselves to be in a working environment once Hurt confirmed their termination, the ALJ concluded that Complainants could not prevail on their claims of hostile work environment harassment based on Hurt's conduct following the discharge. In essence, the ALJ based the dismissal on the fact that Complainants no longer worked for Respondent at the time of the offending conduct. For these reasons, the ALJ granted Respondents' motion to dismiss based on his conclusion that Hurt's conduct was not covered by the LAD because it occurred outside an employer-employee relationship and Complainants therefore could not have reasonably perceived her conduct

as altering their work environment. Accordingly, the ALJ granted the Respondent's motion and dismissed the complaints.[3]

IV. THE PARTIES' EXCEPTIONS AND REPLIES

A. Complainants' Exceptions

Complainants take exception to the ALJ's conclusion that the employment relationship between Complainants and Respondent ceased when Hurt first advised them that they were terminated. Instead, Complainants argue that their employment relationship with Respondent continued beyond their encounters with Hurt because they were expected to and did go back to work while they waiting for Hurt to give them the signed time cards and release them. As such, Complainants urge the Director to reject the ALJ's conclusion that Hurt's offensive remark was not part of Complainants' work environment.

Complainants also take exception to the ALJ's conclusion that the remark was not sufficiently severe to constitute a hostile work environment. Complainants argue that a fact- finder could, consistent with the law, find that a reasonable African-American would believe that Hurt's racist remarks injected hostility and abuse into the working environment

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[3] Both parties construed the ALJ's decision as additionally resting on a second basis, namely, on a conclusion that a reasonable fact-finder could not conclude that Hurt's remark was sufficiently severe to support an LAD claim under the circumstances of this dispute. Specifically, the ALJ determined that despite the severity of the alleged harassment, based on the fact that Complainants believed that their working relationship with Respondent had been severed and because they were preparing to leave the premises, the conduct did not occur in a work environment and was therefore not actionable as severe or pervasive conduct that alters the work environment (ID 8). The Director does not equate this observation with the broader conclusion that Hurt's alleged comment was not sufficiently severe to make a reasonable African-American believe that his or her conditions of employment had been altered and that his or her work environment had become hostile or abusive.

and significantly altered the conditions of Complainants' employment.

B. Respondent's Replies

Respondent replies that the ALJ properly dismissed the complaints since Complainants failed to prove all the necessary elements for establishing a hostile work environment claim. Specifically, Respondent argues that Complainants' employment was terminated at the time of the alleged harassment and they therefore were no longer in a working environment. Accordingly, Respondent insists that since there was no working relationship between the parties at the time of the remark Complainants cannot maintain that they reasonably perceived their conditions of employment to be altered. Respondent asserts that when Complainants stopped working and walked to the Shipping Office to see Hurt and complete the acts necessary for separation and payment, they severed the working relationship and the LAD no longer applied to Respondent's alleged harassment. Thus, Respondent urges the Director to conclude that the ALJ correctly determined that the alleged comment had no impact on the terms and conditions of Complainants' employment.

Additionally, Respondent argues that Hurt's single remark was not sufficiently severe to create a reasonable belief that the conditions of employment had been altered and a hostile work environment created. In support of this argument, Respondent attempts to distinguish the present case from Taylor v. Metzger, 152 N.J. 400 (1998), in which the New Jersey Supreme Court found that a single racial epithet uttered by a supervisor was sufficiently severe to violate the LAD. Respondent asserts that Complainants' allegations differ significantly and therefore do not meet the standard for establishing a hostile

environment claim articulated in Taylor. Respondent notes that , unlike the circumstances of these complaints, the person who made the derogatory remark in Taylor was a high-level manager and that the plaintiff in Taylor had to return to the work environment, maintain a working relationship with the supervisor involved, and interact with other employees after the incident. Respondent further asserts that Taylor is distinguishable from the current matter because the plaintiff in Taylor complained about her supervisor's comment and appeared to suffer significant harm from the event. By way of comparison, Respondent argues that Complainants conceded that they did not complain to Enriquez or anyone else in Respondent's facility about Hurt's conduct. Based on these differences between the cases, Respondent argues that Complainants' allegations of harassment are not analogous to Taylor. Accordingly, Respondent urges the Director to adopt the ALJ's initial decision that, even taking Complainants' testimony regarding Hurt's conduct as true, a reasonable fact-finder could not conclude that the Hurt's remark in this context was sufficiently severe to alter the terms and conditions of Complainants' work environment.

V. THE DIRECTOR'S ANALYSIS

An ALJ must reject a respondent's request for summary dismissal at the close of the complainant's case at hearing if, taking all evidence and the inferences that may reasonably be deduced therefrom in a light most favorable to the complainant, it appears that reasonable minds could differ as to whether the complainant has established liability. See Bell v. Eastern Beef Co., 42 N.J. 126, 129 (1964); Walsh v. Madison Park Properties, Ltd., 102 N.J.Super. 134, 138 (App. Div. 1968); R. 4:37-2(b). Applying these standards, the Director rejects the ALJ's conclusion that these consolidated complaints must fail as a matter of law.

The LAD prohibits an employer from subjecting individuals to differential treatment based on race in hiring, firing, and in the terms, conditions or privileges of employment. N.J.S.A. 10:5-12a. Hostile work environment harassment is a form of discrimination in the terms, conditions or privileges of employment that creates an "intimidating, hostile, or offensive working environment." Lehmann v. Toy 'R' Us, Inc., 132 N.J. 587, 603-04 (1993). Moreover, harassment is an abuse of supervisory power that delivers a message that the victim is inferior or unwelcome because of their protected status.

In this instance, the Director finds that the record reveals sufficient evidence of a material factual dispute regarding Complainants' relationship to Respondent at the time of the alleged harassment to preclude summary dismissal. The ALJ based his decision on a finding that, as a matter of law, a reasonable African-American in Complainants' situation could not have perceived that their conditions of employment had become hostile or abusive to them because of their race because they understood that they were no longer going to be working for Respondent. However, the ALJ also acknowledged that the record was unclear whether, at the time of Hurt's objectionable conduct, Complainants reasonably believed they were to remain in the workplace and continue working through the remainder of the day or until Hurt was willing to sign their time sheets. Indeed, upon Hurt's first refusal to sign the time sheets, Complainants returned to their work stations for approximately two (2) hours (See transcript of hearing conducted November 28, 2001, pp. 20, 37) . Accordingly, taking as true for the purpose of Respondent's motion the evidence that Complainants were asked to work through the end of their shift and that they believed that they had to remain on the premises at least until their time sheets were signed, the

Director finds that Hurt's actions cannot, as a matter of law, be regarded as beyond the scope of the LAD.

Moreover, as previously noted, the Director also takes as true Complainants' testimony that after tearing up their time sheets, Hurt purposefully went on the loudspeaker system and called to another supervisor, Dennis Enriquez, "Dennis, come and get these mother-fucking niggers out of my office" and that the loudspeaker system could be heard throughout the warehouse. (See transcript of hearing conducted November 28, 2001, pp. 20-21, 46). Viewing the record in the light most favorable to Complainants for the purpose of ruling on Respondent's motion, the Director accepts as true that Complainants were told they could work through to the end of their shift and that they did not believe they should leave without having their time sheets signed. The Director additionally must take as true testimony that it was in this context that Hurt ripped up Complainants' time sheets and called to another supervisor over the loudspeaker to "come and get these mother-fucking niggers out of my office." Furthermore, for the purpose of evaluating Respondent's motion, even though Complainants testified that they would have left the building if Hurt had signed their time records authorizing their payment for the day, the Director further presumes that Complainants would have continued to work after the incident if asked or permitted to work until Hurt was ready to sign newly drafted time records. Given this record, Respondent's motion to dismiss based on the absence of any cognizable work relationship must fail because there is evidence which, taken in the light most favorable to Complainants, could support a finding that Complainants believed that until Hurt was prepared to reissue and sign their time records, they were to continue

working for Respondent.

In sum, the Director finds that, construing the evidence in the light most favorable to Complainants, a reasonable fact-finder could conclude that at the time Hurt ripped the time sheets and made the offensive comment over the loudspeaker, Complainants believed they were to return to their work stations and continue their employer-employee relationship with Respondent until the end of the day or until Hurt provided them with the required records to ensure their payment. For all these reasons, the Director concludes that reasonable minds could differ regarding whether Hurt's conduct altered the terms, conditions and privileges of Complainants' employment in a discriminatory manner because of their race. Therefore, the Director finds good cause to reject the initial decision granting Respondent's motion to dismiss the complaints.

More importantly, the Director also wishes to clarify that the LAD's protections against employment discrimination are not necessarily limited only to interactions between employers and their current employees. Indeed, various conduct by an employer toward certain non-employees may violate the LAD's prohibitions of employment discrimination, such as discriminatory employment advertising, interviewing, screening practices and certain unlawful actions against former employees. See Robinson v. Shell Oil Company, 117 S. Ct. 843 (1997) (term "employee" as used in the anti-retaliation provisions of Title VII of the Civil Rights Act includes former employees who challenge post-employment actions of former employer); Charlton v. Paramus Bd. of Educ. 25 F.3d 194, 202 (3rd Cir. 1994) (plaintiff not barred from pursuing a Title VII claim merely because she was not an employee at the time her former employer allegedly acted to interfere with her prospects

of future employment); Silver v. Mohasco Corp., 602 F.2d 1083, 1090-91 (2d Cir.1979), rev'd on other grounds, 447 U.S. 807 (1980) (allowing Title VII post-employment blacklisting claim because it had a reasonable relation to plaintiff's EEOC charge).

These cases indicate that the protections accorded by remedial employment statutes are not automatically discontinued at the moment of termination in all situations. Indeed, the Appellate Division has ruled that a discharged employee who incurred an injury while he was "wind[ing] up his affairs and leav[ing] the premises" after being terminated continued to enjoy the protections of the workers compensation act for a reasonable period following his termination. Gunn v. Accurate Forming Co., 89 N.J. Super 308, 311 (App. Div. 1965). Similarly, in this instance, even if Complainants are regarded as former employees winding up their affairs and preparing to leave the workplace rather than as employees willing to work to the end of their shift or until dismissed from the premises, the LAD's prohibitions against unlawful racial harassment may still protect them from the demeaning racial slurs and offensive conduct they allege. The LAD prohibits severe or pervasive harassment by an employer that alters the terms, conditions, and privileges of employment. A term and condition of Complainants' employment was to be free from the type of hostile, abusive and offensive treatment they contend they endured as they secured their final payment records and left the building with Hurt's insults still hanging in the air. The conduct described by Complainants in this instance may not be deemed beyond the reach of the LAD as a matter of law merely because their humiliation occurred in the final moments of their tenure and was unlikely to continue much longer.

Furthermore, the Director rejects Respondent's arguments that, even if taken as

true, Complainants' versions of events do not rise to the level of severity required to establish a violation of the LAD. An individual who seeks to establish a prima facie case of hostile work environment racial harassment LAD:

> must demonstrate that the defendant's 'conduct (1) would not have occurred but for the employee's [race]; and [the conduct] was (2) severe or pervasive enough to make a (3) reasonable [African American] believe that (4) the conditions of employment are altered and the working environment is hostile or abusive.
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> [Taylor v. Metzger 152 N.J. 490, 498 (1998) citing Lehmann v. Toy 'R' Us, Inc., supra, 132 N.J. at 603-04 (emphasis omitted)].

In Taylor the Supreme Court found that a single extreme racial epithet ("Jungle Bunny") uttered to an African American female by her supervisor was sufficiently severe to create a hostile work environment. Ibid. In recognizing that a single severe incident can alter the terms and conditions of a person's employment, the Taylor Court noted that epithets are regarded as especially egregious forms of harassment, capable of engendering a severe impact, and that their meanings are often a critical, if not determinative factor in establishing a hostile work environment. Taylor supra, at 502. Words such as "jungle bunny" and "nigger" are unambiguously racist and "discrimination per se ..." Ibid. quoting Bailey v. Binyon 583 F. Supp. 923, 927 (N.D. Ill. 1984). The experience of being called such names "is like receiving a slap in the face. The injury is instantaneous." Ibid. at 503.

Applying these standards, it is clear that the alleged actions of Hurt, if proven, are sufficiently severe to match the "rare and extreme" case of unlawful harassment based on a single event. Clearly, the alleged tearing of a document needed for compensation for work performed and the broadcast in the workplace over a loudspeaker of the phrase,

"Dennis, come and get these mother-fucking niggers out of my office," would make a reasonable African-American employee believe that the terms, conditions and privileges of his or her employment have been altered and that the working environment has become hostile, offensive or abusive because of their race. Moreover, in this instance, Hurt's alleged conduct was actually more egregious than the single comment uttered in Taylor. Here, the slur was more stinging and was made more insulting and shocking by the use of strong profanity. Moreover, on this motion, it must be accepted that Complainants' supervisor deliberately broadcast the demeaning remark over a loudspeaker heard by all other employees in the facility, thus ensuring that Complainants were publically humiliated before all within earshot of the loudspeakers. With respect to testimony that Complainants did not complain about Hurt's comment as they secured their final paperwork and left the

premises, in evaluating whether conduct is sufficiently severe or pervasive to violate the LAD " it is the harassing conduct that must be severe or pervasive, not its effect on the plaintiff or on the work environment." Lehmann v. Toy 'R' Us, Inc., supra, 132 N.J. at 606.

For all these reasons, the Director concludes that Hurt's conduct, if proven to have occurred as described in Complainants' testimony recounted herein, was so patently offensive and unambiguously racist that it was capable of altering Complainants' work environment in violation of the LAD.

V. ORDER

Based on all of the above, the Director rejects the initial decision and remands this matter for further proceedings to determine whether the events occurred as described in Complainants' testimony and, if so, to develop a factual basis upon which the Director can fashion appropriate remedies.

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DATE JEFFREY BURSTEIN
ACTING DIRECTOR
DIVISION ON CIVIL RIGHTS