

# PERCEPTION, AN EXPANSION OF THE SCOPE OF THE LAW AGAINST DISCRIMINATION

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The New Jersey Law Against Discrimination (LAD) makes it unlawful to subject people to differential treatment based on race, creed, color, national origin, nationality, ancestry, age, sex and a number of other criteria. In order to establish a hostile work environment, a plaintiff must prove that: (1) the conduct would not have occurred “but for” his identity within a class protected by the LAD, and (2) the conduct was severe or pervasive such that (3) a reasonable person in the same protected class would believe that (4) “the conditions of employment are altered and the working environment is hostile or abusive.” Cutler v. Dorn, 196 N.J. 419, 430 (2008) (quoting Lehmann v. Toys ‘R’ Us, Inc., 132 N.J. 587, 603-04 (1993)).

The recently published case of Cowher v. Carson & Roberts, 425 N.J. Super. 285; 40 A.3d 1171 (App. Div. 2012) has now expanded the reach of a claim under the LAD on the basis of perception. In the Cowher case, the plaintiff was employed as a truck driver for Carson & Roberts for two years. During that time period, the plaintiff was repeatedly subjected to anti-Semitic slurs, derogatory jokes and harassment. In spite of the plaintiff’s requests to his co-workers to stop their comments, he was bullied on a daily basis with insults pertaining to his perceived status as a member of the Jewish faith. Perception is key here, as the plaintiff was in fact not Jewish.

The defendants were initially granted summary judgment on the basis that perceived status was not actionable because New Jersey did not recognize a cause of action premised upon perceived membership in a protected group, other than for disabled persons. The trial court’s rationale was that the plaintiff had not met the criteria for establishing a claim under the LAD because he was not a member of a protected class. The plaintiff appealed this ruling, and the Appellate Division overturned the lower court’s finding.

In reviewing the above matter, the Appellate Division found that the plaintiff need not be Jewish in order to satisfy the elements of a violation of the LAD. The court found that the plaintiff instead needed to prove that the conduct of the defendants would not have occurred but for the perception that the plaintiff was Jewish. In light of the fact that the plaintiff was not Jewish, the court noted that the reasonable person standard, with regard to whether a reasonable person in the same protected class would believe that the conditions of employment were altered/hostile, would be examined from the perspective of a reasonable Jewish person.

In overturning the lower court’s decision, the court rationalized that the defendants were motivated by their belief that the plaintiff was in fact Jewish and, thus, engaged in the kind of discrimination and harassment that the LAD seeks to eliminate. During the course of discovery, the plaintiff produced DVDs containing video footage in which the defendants had made repeated anti-Semitic comments to him. Given that the DVDs had been produced beforehand, at depositions the defendants admitted that there were instances in which they had used anti-Semitic slurs against the plaintiff. One defendant, in particular, could not remember how many times he had made anti-Semitic comments and guessed that he had made derogatory remarks on at least twenty occasions. In light of the circumstances, the court found that, the fact that plaintiff was not Jewish, was not sufficient to bar the defendants’ actions from liability under the LAD.

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Prior to Cowher, in order to have a claim under the LAD, a person had to be a member of a protected class in order to satisfy the elements for a cause of action, except in circumstances in which someone was perceived to be disabled. The Appellate Division cited the case of Poff v. Caro, 228 N.J. Super. 370 (Law Div. 1987) to explain this distinction. In Poff, a judge found a landlord liable for discrimination after he refused to rent an apartment to three gay men because he feared they would contract AIDS. The Poff court determined that there was discrimination based on a perception of a handicap, which was within the protection of the LAD. In setting forth the Cowher opinion, Judge Edith Payne of the Appellate Division articulated that there is “no reasoned basis to hold that the LAD protects those who are perceived to be members of one class of persons enumerated by the Act and does not protect those who are perceived to be members of a different class, as to which the LAD offers its protections in equal measure.”

Cowher is a groundbreaking case that has dramatically expanded the potential for claims under the LAD. Plaintiffs need only introduce some facts that demonstrate that they were perceived to be members of a protected class. Thereafter, the alleged discriminatory behavior in question will not be evaluated from the point of view of the plaintiff, but from the perspective of a reasonable person of the protected class that they were perceived to be a member of.

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