

GARDEN STATE CLE LESSON PLAN

A 1.0 credit course

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LESSON PLAN AND EVALUATION**

INTRO TO THE LAW AGAINST DISCRIMINATION

With

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Program description

In 1945, the New Jersey Legislature enacted the nation's first state-wide civil rights enforcement statute, the New Jersey Law Against Discrimination (LAD). N.J.S.A. 10:5-1, et seq.

Recently, the LAD was amended to prohibit discrimination in New Jersey on the basis of sexual orientation. This 1 credit CLE will give you the run down on how Discrimination Law works in NJ.

I. Introduction

- *Fraser v. Robin Dee Day Camp*, 44 N.J. 480 (1965) – defendant was Jack Alvino, case of first impression, racial discrimination – argued private day camp – not public accommodation
- The New Jersey Law Against Discrimination (LAD) – NJSA 10:5-1 *et seq.*
- Working in municipal court one night – co counsel on a case had space in his law firm and had a case of sexual harassment and took that case – became passionate for it
- Area of litigation with general practice – discrimination is main area of litigation

II. The practice of discrimination law

- Yellow page ads
- Website – www.lyndaleelaw.com
- Do initial intake over the phone to feel out the case
- “At Will” employee – an employer can terminate an employee at any time for any reason, except an illegal one, or for no reason without incurring legal liability. Likewise, an employee is free to leave a job at any time for any or no reason with no adverse legal consequences. See *English v. College of Medicine and Dentistry*, 73 NJ 20 (1977); *Witkowski v. Lipton*, 136 NJ 385 (1994).
- Most employees are at will – unless there is an employment contract
- Listen to client story and determine that there has been some type of discrimination going on
- Very hard for defense to get out on summary judgment
- LAD protects “handicapped” people – which include but are not limited to: those suffering from epilepsy, alcoholism, AIDS, tested positive for HIV, heart conditions, obesity, addiction to illegal drugs and those suffering from emotional ailments. See NJSA 10:5-5(q) and NJSA 10:5-4.1; *Clowes v. Terminix Int’l Inc.*, 109 NJ 575 (1988).
- “he said, she said” type case
- Larger firms get paid hourly – but LAD is a fee shifting statute – NJSA 10:5-27.1 – do not want to deter

- individuals from litigating by requiring them to pay for attorney hourly rates**
- **Take a retainer up front – depending on bona fides of the case – hybrid billing – client pays costs and fees – billing records kept and then application for defense to pay fees if win at trial based on hourly rate of billable hours**
- **For the purpose of settlement – fees give leverage to settle because could be on the hook to pay fees if successful at trial**
- **Fee is based on amount of effort and complexity of the case**
- **Judge must approve paying fees if successful at trial**
- **Damages for lost wages, emotional distress – if supervisory, then employer is on the hook**
- **If settle case, then contingency for 1/3 of the settlement – not reimbursed for hourly billing – just straight 1/3 fee**
- **Incentive for both sides to settle**
- **Deposition process**
- **There are times when defendants have insurance for these types of cases – depending on policy**
- **Many times defense is represented by attorney paid for by insurance company**

III. LAD v. Civil Rights

- **A person can go to DCR and file a complaint without an attorney**
- **NJSA 10:5-3: the Legislature finds and declares that practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the US, disability or nationality, are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State; provided, however, that nothing in this expression of policy prevents the making of legitimate distinctions between citizens and aliens when required by**

federal law or otherwise necessary to promote the national interest.

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, gender identity or expression, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, disability 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.

The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.

- **Modification by contract: The at-will presumption is a default rule that can be modified by contract. For example, a contract may provide for a specific term of employment or allow termination for cause only. Typically, US companies negotiate individual employment agreements only with high level employees. Collective**

- bargaining agreements usually provide that requested employees may only be terminated for cause.**
- **You can contract your discriminatory rights away.**
 - **Can LAD apply to those individuals who cannot get driver's licenses because they are not in the US legally?**
 - **Whether someone is lawfully in the US is not relevant to such a claim (LAD)**
 - **“liberally construed” – courts are supposed to give broad construction to achieve purpose of the act**
 - **LAD is remedial**
 - **Recitation of legislative history in complaints to underscore purpose of law**
 - **Racial discrimination still exists**
 - **Employer's motives must be discriminatory**
 - **Specific requirements under the LAD of how to treat women who are pregnant – protected class under the statute**
 - **New Jersey Family Leave Act (FLA) – NJSA 34:11B-9**
 - **Cannot fire but don't need to keep their job – can't hurt business to keep someone's job open**
 - **“Creed” – religious belief system**
 - **“ancestry” – blood lines – similar to national origin**
 - **“gender identity” – new definition in the law; individuals who describe themselves as one gender but they are biologically a different gender**
 - **Each is a “protected class”**
 - **Employment and accommodations – Katzenbach v. McClung, 379 US 294 (1964)**
 - **Civil Rights – NJSA 10:5-4 - Obtaining employment, accommodations and privileges without discrimination; civil right.**
 - 4. **All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, nationality, sex ,**

- gender identity or expression or source of lawful income used for rental or mortgage payments, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.**
- **“place of public accommodation” – buses, restaurants, hotels, doctor’s office, donut shop**
 - **“[T]he overarching goal fo the [LAD] is nothing less than the eradication ‘of the cancer of discrimination.’”**
Fuchilla v. Layman, 109 NJ 319 (quoting *Jackson v. Concord Co.*, 54 NJ 113, 124 (1969)), *cert denied*, 488 US 826 (1988). **“[D]iscrimination threatens not only the rights and proper privileges of the inhabitants of [New Jersey,] but menaces the institutions and foundation of a free democratic State.”** *N.J.S.A. 10:5-3*. **In furtherance of its purpose to root out discrimination, the Legislature has directed that the LAD “shall be liberally construed.”** *Ibid*. **We have adhered to that legislative mandate by historically and consistently interpreting the LAD “with that high degree of liberality which comports with the preeminent social significance of its purposes and objects.”** *Anderson v. Exxon Co.*, 89 NJ 483, 495 (1982)(quoting *Passaic Daily News v. Blair*, 63 NJ 474 (1973)).
 - *Boy Scouts of America v. Dale*, 530 US 640 (2000)
 - Controversial case
 - **Burden of proof is preponderance of the evidence**
 - **Unlikely to have hostile work environment without sexual harassment**
 - **Hostile work environment context goes to sexual harassment**
 - **CEPA claim – can have without sexual harassment – Conscientious Employee Protection Act; *N.J.S.A. 34:19-1***
 - **Employment discrimination**
 - **Most LAD cases relate to employment**
 - *Bragdon v. Abbott*, 524 US 624 (1998) – case where dentist refused to treat someone who had AIDS

IV. Sexual Harassment

- *Lehmann v. Toys R Us, Inc*, 626 A.2d 445 (1993)

- **Quid pro quo – you will get this if you do that for me, or vice versa**
 - **Need threat that unless employee exceeds to demands then loss of job will result – adverse employment consequences**
 - **Always supervisor is actor**
 - **Not consensual – defense argues it is consensual**
- **Hostile work environment**
 - ***Tarr v. Ciasulli*, 181 NJ 70 (2004) – Tarr worked for auto dealer as finance person, sexually harassed by co-workers and supervisors, hostile work environment, others were harassed and sued and won, emotional distress issue was largest issue, victim was not soft and cuddly individual – jury appeal?, employer tolerated hostile environment**
 - **Comments, innuendo**
 - **Supervisor harassment allows for punitive damages to be paid by the employer**
 - **Harassment does not have to be sexual in nature – but because of the victim’s gender**
- **Statute does not restrict the gender of the victim to females**
- ***Lockley v. Department of Corrections*, 177 NJ 413 (2003) – male corrections officer, sexually harassed by female supervisor**
- ***In re Seaman*, 133 NJ 67 (1993) – law clerk case**
- ***Lehmann* is the main case to review for procedural issues – details that you need to prove and allege**
- **Conduct would not have occurred but for gender of victim**
- **Not all inappropriate conduct at work rises to the level of sexual harassment – severe and pervasive**
- **Weed out cases where there are things that are minor – swearing in the office is not sufficient, reasonable woman standard**
- **Applicable to men and women**
- **Employment discrimination based upon age**
- **Wrongful termination – many cases are wrongful termination**
- **Physical disability**
- **CEPA Claims – short statute of limitations**

- ***Soliman v. Kushner Companies, Inc.*, 433 NJS 153 (App. Div. 2013) – condo complex with 2 public restrooms for each gender, installed cameras into washrooms to deter illegal behavior but installed secretly, intentional infliction and negligent infliction of emotional distress**

V. Contact information

- **Office phone number: 732-974-7409**

VI. Advice to attorneys interested in this area of law

- **Rewarding area of law to practice**
- **Some days is very frustrating but ultimately helped someone**
- **Can be lucrative with the right case**