

706 A.2d 685

Supreme Court of New Jersey.

Carrie TAYLOR, Plaintiff-Appellant,

v.

Henry W. METZGER, Burlington County Sheriff,
Defendant-Respondent.

Argued Sept. 9, 1997.

Decided Feb. 18, 1998.

The opinion of the Court was delivered by

HANDLER, J.

The central issue in this appeal is whether a single derogatory racial comment directed against a subordinate employee by a supervisor can create a hostile work environment in violation of the Law Against Discrimination. ***

The employee in this case, a county sheriff's officer, claims that her employer, the county sheriff, uttered a racial epithet against *495 her in the presence of another supervisor, the undersheriff. The victim filed a complaint against the sheriff alleging primarily that the racial insult constituted a violation of the Law Against Discrimination.

The trial court entered a summary judgment for defendant on that claim. The court also dismissed other counts of the complaint, namely, intentional infliction of emotional distress, prima facie tort, and violation of federal civil rights statutes. The Appellate Division affirmed that judgment in an unreported decision. This Court granted plaintiff's petition for certification. 147 N.J. 578, 688 A.2d 1053 (1997).

I

In 1972, plaintiff Carrie Taylor began working as a sheriff's officer in the office of the Burlington County Sheriff. On January 31, 1992, Taylor, who is African American, was at the Burlington County Police Academy for firearms training and weapons qualification. While there, she encountered defendant Henry Metzger and Undersheriff Gerald Isham.

Taylor said hello, and, in response, Metzger turned to Isham and stated: "There's the jungle bunny." Isham laughed. Plaintiff believed the remark to be a demeaning and derogatory racial slur, but she did not reply. She became a "nervous wreck," immediately began crying, and went to *496 the bathroom. Taylor subsequently returned to the Police Academy classroom, in which she was the only African American and the only woman. Holding back tears, she related her experience to co-workers. The officers laughed; one responded: "I'm a black Irishman." This comment further offended plaintiff, who felt their reactions were insensitive.

* * *

Plaintiff claims that the incident caused her emotional distress for which she consulted a psychiatrist, Dr. Ira L. Fox, on a periodic basis between May 1992 and March 1993. She was scared and remained "a nervous wreck." She was afraid to leave work by herself and lived in constant fear of reprisal; she bought a bullet-proof vest. Plaintiff suffered from severe middle and nighttime insomnia; experiencing nightmares and flashbacks of the incident, she would wake up hourly and then have trouble falling back asleep. She also had mood changes and developed a psychiatric itch. Taylor told Dr. Fox that she had been losing her hair since the incident. Dr. Fox treated her with an anxiolytic, Ativan. He diagnosed her with "adjustment disorder with mixed emotional features" and later revised that diagnosis to "post-traumatic stress disorder." He concluded that her disorder was "directly related to and caused by the incident to her person when she was reportedly called a jungle bunny by Mr. Metzger." Although Dr. Fox determined that plaintiff still needed ongoing psychotherapy to deal with the emotional stress arising out of *498 defendant's remark, plaintiff stopped seeing Dr. Fox in March 1993 because she could no longer afford the therapy.

II

The Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42, prohibits discrimination "because of race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, or nationality." N.J.S.A. 10:5-3.

The gravamen of the complaint filed by plaintiff against Metzger is the allegation that the racial comment he directed against her constituted racial harassment, an act of discrimination in violation of the LAD.

In *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 626 A.2d 445 (1993), this Court formulated the basic standard for determining whether acts of harassment in the workplace constitute invidious discrimination in violation of the LAD. When a black plaintiff alleges racial harassment under the LAD, she must demonstrate that the defendant's "conduct (1) would not have occurred but for the employee's [race]; and [the conduct] was ****689** (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." *Id.* at 603-04, 626 A.2d 445 (emphasis omitted).

Here, the basic issue of law is whether the single remark uttered by defendant was, from the perspective of a reasonable African American, sufficiently severe to have produced a hostile work environment. Because this case was determined by summary judgment, the key question and more pointed inquiry is whether a rational factfinder could reasonably determine on the basis of plaintiff's evidence that the racial insult directed ****690** at her by the sheriff in the presence of the undersheriff was, under the surrounding circumstances, sufficiently severe to have created a hostile work environment.

Usually repeated racial slurs must form the basis for finding that a hostile work environment has been created. *E.g.* *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126, 1131 (4th Cir.1995) (finding a prima facie case of national origin harassment because of repeated ethnic slurs uttered toward an Arab-American employee); *Boutros v. Canton Regional Transit Auth.*, 997 F.2d 198, 204 (6th Cir.1993) (same); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345, 349 (6th Cir.1988) (stating repeated slurs are necessary to establish a racial harassment claim), *cert. denied*, 490 U.S. 1110, 109 S.Ct. 3166, 104 L.Ed.2d 1028 (1989); ***501** *Erebia v. Chrysler Plastic Prod. Corp.*, 772 F.2d 1250, 1256 (6th Cir.1985) (holding

repeated racial slurs created a hostile work environment), *cert. denied*, 475 U.S. 1015, 106 S.Ct. 1197, 89 L.Ed.2d 311 (1986); *Rogers v. Equal Employment Opportunity Comm'n*, 454 F.2d 234, 238 (5th Cir.1971) (same), *cert. denied*, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972). Generally, "'mere utterance of an ... epithet which engenders offensive feelings in an employee,' does not sufficiently affect the conditions of employment to implicate Title VII." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L. Ed.2d 295, 302 (1993) (quoting *Meritor*, supra, 477 U.S. at 67, 106 S.Ct. at 2405, 91 L. Ed.2d at 60); *see also* *Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir.1994) (holding two racial slurs insufficiently severe because there was no barrage of opprobrious racial comments), *cert. denied*, 516 U.S. 826, 116 S.Ct. 92, 133 L. Ed.2d 48 (1995).

Some courts have found that a particularly offensive remark, if not repeated, will not be sufficient to establish a hostile work environment. *E.g.*, *McCray v. DPC Indus., Inc.*, 942 F.Supp. 288, 293 (E.D.Tex.1996) (holding sporadic racial slurs by co-workers insufficiently severe to establish a hostile work environment); *Bivins v. Jeffers Vet Supply*, 873 F.Supp. 1500, 1508 (M.D.Ala.1994) (holding a co-worker once calling the plaintiff a "nigger" insufficiently severe to establish a hostile work environment), *aff'd*, 58 F.3d 640 (11th Cir.1995); *Reese v. Goodyear Tire & Rubber Co.*, 859 F.Supp. 1381, 1385, 1387 (D.Kan.1994) (holding a manager insinuating that all black people abused drugs insufficiently severe to establish a hostile work environment); *Bennett v. New York City Dep't of Corrections*, 705 F.Supp. 979, 983 (S.D.N.Y.1989) (concluding that corrections officer's remark, "hey black bitch, open the ... gate," to another officer did not amount "to more than a mere episodic event of racial antipathy" and was insufficient to sustain a claim of a racially hostile work environment).

Nevertheless, a single utterance of an epithet can, under particular circumstances, create a hostile work environment. As expressed by the court in *Nadeau*, supra, although

***502** many of the cases considering hostile environment harassment claims [] involve a pattern of inappropriate conduct, there is no requirement that harassment occur more than one time in order to be actionable. The standard contemplates

conduct that is either severe or pervasive. Although the conduct may be both, only one of the qualities must be proved in order to prevail. The severity of the conduct may vary inversely with its pervasiveness. Whether the conduct is so severe as to cause the environment to become hostile or abusive can be determined only by considering all the circumstances, and this determination is left to the trier of fact.

[675 A.2d at 976.]

The connotation of the epithet itself can materially contribute to the remark's severity. Racial epithets are regarded as especially egregious and capable of engendering a severe impact. *See* Robert J. Gregory, *You Can Call Me a "Bitch" Just Don't Use the "N-word": Some Thoughts on Galloway v. General Motors Service Parts Operations and Rodgers v. Western Southern Life Insurance Co.*, 46 DePaul L.Rev. 741, 748 (1997) ("Courts have viewed racist epithets as beyond the pale, regardless of the prevalence of these epithets in the workplace."). The meaning of a racial epithet is often a critical, if not determinative, factor in establishing a hostile work environment. *E.g.*, **691 *Rodgers*, supra, 12 F.3d at 675 (noting that the term "nigger" is an unambiguously racist epithet); *Reid*, supra, 1996 WL 411494, at *4 (ruling that "it is very possible that the term 'Coon-Ass' is racially derogatory or severe enough, in and of itself, to create a hostile work environment"); *Bailey v. Binyon*, 583 F.Supp. 923, 927 (N.D.Ill.1984) ("The use of the word 'nigger' automatically separates the person addressed from every non-black person; this is discrimination per se...."); *see also* *Rocha Vigil*, supra, 119 F.3d at 873 n. 3 (Lucero, J., dissenting) (*Harris*, supra, "does not mean that [a] severely degrading, racially derogatory insult of the worst kind escapes actionability under Title VII simply because it is used only occasionally.").

In this case, defendant's remark had an unambiguously demeaning racial message that a rational factfinder could conclude was sufficiently severe to contribute materially to the creation of a hostile work environment. The term defendant used, "jungle bunny," is patently a racist slur, and is ugly, stark and raw in its *503 opprobrious connotation. *See* *Washington v. Court of Common Pleas of Phila. County*, 845 F.Supp. 1107, 1110 (E.D.Pa.1994) (recognizing that "jungle bunny" is a racist remark),

rev'd on other grounds, 47 F.3d 1163 (3d Cir.1995). In common parlance, "jungle bunny" is a racial slur directed at blacks. *The Dictionary of Contemporary Slang* 285 (1st Ed.1990); Paul Beale, *A Concise Dictionary of Slang and Unconventional English* 244 (1st American Ed.1989). It is a slur that, in and of itself, is capable of contaminating the workplace. *Bolden v. ABF Fabricators, Inc.*, 864 F.Supp. 1132, 1133-34 (N.D.Ala.1994) (referring to black people as "jungle bunnies," among other slurs, created a racist working environment); *cf.* *Resetar v. State Bd. of Educ.*, 284 Md. 537, 399 A.2d 225, 238 (1979) (upholding dismissal of schoolteacher for referring to black students within earshot as "jungle bunnies" because the epithet is sufficiently vicious), *cert. denied*, 444 U.S. 838, 100 S.Ct. 74, 62 L.Ed.2d 49 (1979). Racial slurs are a form of vilification that harms the people at whom they are directed. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L.Rev. 2320, 2338 (1989) ("However irrational racist speech may be, it hits right at the emotional place where we feel the most pain."); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431, 452 (1990) ("The experience of being called 'nigger,' 'spic,' 'Jap,' or 'kike' is like receiving a slap in the face. The injury is instantaneous.").

Severity and workplace hostility are measured by surrounding circumstances. An offensive remark directed against a black employee must under the circumstances be "severe or pervasive enough to make a ... reasonable [African American] believe that ... the conditions of employment are altered and the working environment is hostile or abusive." *Id.* at 603-04, 626 A.2d 445. The comment in context must be viewed from the perspective of a reasonable African American situated as the plaintiff. *See* *Torres*, supra, 116 F.3d at 632-33 (using a reasonable Puerto Rican standard for a Puerto Rican plaintiff); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081 (3d Cir.1996) (stating that plaintiff must show racial harassment "would detrimentally affect a reasonable person of the same race in that position"); *Dickerson v. State of N.J., Dep't of Human Servs.*, 767 F.Supp. 605, 616 (D.N.J.1991) (stating that standard is a reasonable person of plaintiff's race).

A rational factfinder may conclude that under the circumstances a reasonable African American could believe that, when the chief executive of her office calls her a "jungle bunny," he thinks she has less worth as a person and is inferior to other employees because of her race. Moreover, a jury could reasonably find that the reasonable African ****693** American would believe that such a remark made in the presence of another supervising officer portrays an attitude of prejudice that injects hostility and abuse into the working environment and significantly alters the conditions of her employment. *See* Rodgers, supra, 12 F.3d at 675 ("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." (citation and internal quotations omitted)).

Accordingly, we conclude plaintiff has presented adequate evidence of the severity of defendant's remark to create a genuine ****694** issue of material fact sufficient to survive defendant's motion for summary judgment. A rational factfinder, crediting plaintiff's evidence, could conclude that defendant engaged in discriminatory harassment by uttering a racial epithet that was sufficiently severe to have created a hostile work environment. We reverse the order of summary judgment for defendant on the claim of LAD racial discrimination based on workplace harassment.

***524** GARIBALDI, J., dissenting in part,
concurring in part.

I LAD CLAIM

I agree with the majority that the standards established in *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587, 626 A.2d 445 (1993), apply to racial discrimination cases, that a single incident of racial harassment may be severe enough to produce a hostile work environment, and that the fact the single ****702** remark here was made by the Sheriff is a factor to be

considered. However, I believe, as did the trial court and the Appellate Division, that "despite the defendant's deplorable use of a racial slur, 'the workplace, objectively viewed, [was] not hostile.' "

Although a single incident of racial harassment can result in a hostile work environment, "it will be a rare and extreme case in which a single incident will be so severe that it would ... make the working environment hostile." *Lehmann*, supra, 132 N.J. at 606-07, 626 A.2d 445. As the majority properly recognizes, "usually repeated racial slurs must form the basis for finding that a hostile work environment has been created." *Ante* at 500, 706 A.2d at 690 (citations omitted); *see also* *Ellison v. Brady*, 924 F.2d 872 (9th Cir.1991) ("Although a single act can be enough, ... generally repeated incidents create a stronger claim of hostile ***525** environment, with the strength of the claim depending on the number of incidents and the intensity of each incident.") (quoting *King v. Board of Regents*, 898 F.2d 533, 537 (7th Cir.1990)).

It is the "harasser's conduct, not the plaintiff's injury, that must be severe or pervasive." *Lehmann*, supra, 132 N.J. at 610, 626 A.2d 445. Because the Sheriff, plaintiff's supervisor, made the remark, its severity is exacerbated. Nonetheless, while the Sheriff's remark was extremely offensive, demeaning and humiliating, he used the racial epithet only once.
