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## COMMENTARY

### Should Religious Slurs Amount to a Hostile Workplace?

#### Double Standard Is Knocked Down

By Richard M. Schall

Prior to the Supreme Court's decision in *Cutler v. Dorn*, the lower courts had created a double standard in hostile work environment cases. Plaintiffs alleging a claim based on religion and/or ancestry (in cases that typically involved Jewish plaintiffs) were required to bear a greater burden than were minority plaintiffs or female plaintiffs.

With the Supreme Court's decision in *Cutler*, that double standard no longer survives: "A claimant asserting harassment on the basis of religious beliefs and ancestry is not required to bear a heavier burden in order to place his hostile work environment claim before the jury."

In knocking down this double standard, the Supreme Court simply brought the case law in harmony with the governing statute — the New Jersey Law Against Discrimination. Nothing in that statute would support a per se ranking of hostile work environment claims that, for example, might list age-based harassment above race-based harassment, but below sexual harassment, equal to disability harassment, but not quite as bad as

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religious harassment, etc.

In his op-ed article, Mr. Peach raises the specter of the Supreme Court's decision in *Cutler* throwing open the doors to the courthouse so that "white males" claiming harassment by other "white males" will have their cases willy-nilly ushered in front of a jury for trial.

For a number of reasons, his fears are unfounded.

First, to characterize *Cutler* as a case about white males harassing white males is to ignore the proverbial elephant in the room. While the plaintiff may have been a "white male," he was also a Jewish white male who was subjected to repeated acts of harassment on account of his religion and ancestry.

The harassment *Cutler* suffered had nothing in common with the scenario of a bunch of white guys sitting around "busting each other's chops." This was not a case of one guy saying to the other, "you're dumber than a box of nails," and the other guy responding, "and so's your mother." If those had been the facts, we wouldn't be having this dialogue. To the contrary, as the Supreme Court recognized, this was a case about *Cutler*, a Jew, being repeatedly subjected to vile, anti-Semitic comments.

*Cutler* testified that the police chief regularly referred to him as "the Jew" and asked him, on at least one occasion, "where his big Jew ... nose was." *Cutler*

further claimed that the department lieutenant made comments to him such as "Jews make all the money," "Jews are good with numbers" and "why didn't you go into your family business ... why are you here?" In regard to these comments, the Court observed that they "perpetuated some of the odious and vicious stereotypes of Jews circulated during medieval times and the Nazi era."

But in addition to the harassment directed at him by his superiors, *Cutler* detailed anti-Semitic harassment by his co-workers, including the most serious incident in which a co-worker, in *Cutler's* presence, made a reference to "those dirty Jews," which he later amplified to "let's get rid of all those dirty Jews." *Cutler* considered those comments to constitute advocacy of genocide. In light of these facts, this is hardly just a case of a "white male" harassing another "white male."

Second, while the Court in *Cutler* made clear that claims of a hostile work environment based on religion and/or ancestry will no longer bear a greater burden than claims of hostile work environments based on race or sex, Mr. Peach misses the mark in leveling his charge that *Cutler* is representative of "judges becom[ing] seduced by an absolutist, all discrimination is equal view of civil rights laws."

In *Cutler*, the Supreme Court made clear that the courts need to continue to evaluate the context — historical and otherwise — in evaluating the strength of the evidence adduced by the plaintiff: "The unique history and background of *Cutler's* Jewish faith and ancestry provide the contextual set-

ting for our consideration of the totality of the evidence marshaled by Cutler in support of his hostile work environment claim.”

In this regard, the *Cutler* decision is consistent with the Supreme Court’s earlier decision in *Taylor v. Metzger*, where it found that even a single racist

utterance, given its connotation, could create a hostile working environment.

Finally, Mr. Peach need not worry that “white-on-white” hostile work environment cases will now become the next fashionable cause of action. To be actionable, a hostile work environment claim must be based on some charac-

teristic protected by LAD — whether race, age, sex, disability or otherwise. To imagine a scenario of “white on white” harassment might make for a not-very-funny “Saturday Night Live” sketch (“Man, are you white ... . Yeah, but not as white as you ... .”), but it’s a scenario we will never see in court. ■