NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

SHI-JUAN LIN and

THE DIRECTOR OF THE NEW JERSEY

DIVISION ON CIVIL RIGHTS,

Complainants-Respondents,

v.

DANE CONSTRUCTION CO., and

PAT BUCKLEY, Individually,

Respondents-Appellants.

March 17, 2015

Submitted October 6, 2014 – Decided

Before Judges Sabatino and Leone.

On appeal from the Department of Law & Public Safety, Division on Civil Rights, Docket No. EM14WB-54045.

Frank M. Gennaro, attorney for appellants.

John J. Hoffman, Acting Attorney General, attorney for respondent New Jersey Division on Civil Rights (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Deputy Attorneys General James R. Michael, Charles S. Cohen and Farng-Yi Foo, on the brief).

Respondent Shi-Juan Lin has not filed a brief.

PER CURIAM

Defendants, Dane Construction Company (Dane) and its principal Pat Buckley, appeal from the final decision and order of the Director of the Division on Civil Rights (Division) on behalf of complainant Shi-Juan Lin. The Director ruled that defendants subjected Lin to a hostile work environment and constructively discharged her, in violation of the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42. We affirm.

I.

The following facts were found by the Administrative Law Judge (ALJ). Lin is a woman of Chinese descent. She lives with her fiancé, who is black and of Jamaican descent. Their son was four years old when Lin began working for Dane in February 2008. Buckley was aware that Lin had a bi-racial son of Jamaican and Chinese descent.

The ALJ found that Buckley called a customer's representative "this f*cking Jamaican nigger" within Lin's earshot in May 2008. Later, also within Lin's hearing, Buckley referred to an African-American employee as a "crazy nigger." Lin later heard Buckley call her supervisor "you f*ckin' nigger," and the manager said to Buckley, "you're a f*ckin' white nigger." Again in Lin's earshot, Buckley referred to his lawyer as "this f*cking nigger." Lin also heard Buckley comment that something was just "the nigger way."

In addition, Lin testified that Buckley said her "jeans look nice on [her] oriental ass." The ALJ cited Lin's testimony and found that "Buckley or another employee" made the remark. Buckley testified it was another employee, and that Buckley chastised him.

The Director adopted the ALJ's factual findings. In addition, the Director found that Lin also heard Buckley use the word "nigger" on other occasions in everyday conversation. Lin testified that Buckley used the "N word" at least once a day.

Lin testified to additional details. When she was working for Dane, she was living with her son, her fiancé, and members of his family, who are also Jamaican. When she interviewed with Buckley for a position at Dane, he learned that her fiancé was black

and her son half-black. After she showed him a picture of her son, Buckley responded, "what is it with you girls and these Black guys?" She thought he was joking.

Lin testified that she worked in Dane's small three-person office with Buckley and her supervisor. Buckley's use of "nigger" was hurtful to her because of her son's race, and offensive to her fiancé's race. When Buckley yelled "this f*cking Jamaican nigger," Lin pointed to her computer's screensaver, which was a photo of her son, and said to Buckley: "You know my fiancé is Jamaican and you know my son is. Right?" Buckley responded he was "not saying [the epithet] toward your son." Lin replied that Buckley should not say that around her because it was "really hurtful" as her son was Jamaican and black, as was her fiancé's family. When she complained to her supervisor about Buckley's "crazy nigger" comment, she was told "that's just how [Buckley] is." When she told her supervisor about Buckley's "oriental ass" comment, he just laughed.

Lin testified that Dane had become a bad working environment, causing her to suffer from hives, anxiety, depression, and loss of sleep. She complained to Buckley and her supervisor, but nothing changed. She quit in June 2008, telling Buckley she was leaving because she could no longer tolerate his use of the "N word," which had really upset her.

In July 2008, Lin filed a complaint with the Division, claiming hostile work environment and constructive discharge, "because of National Origin/Chinese and Race/Black," in violation of the LAD. The Division investigated, interviewed witnesses, and considered defendants' response. The Director issued a finding of probable cause, and intervened as a complainant. See N.J.A.C. 13:4-2.2(e). The matter went before the ALJ, who heard testimony for two days.

Despite finding that Buckley had repeatedly used the word "nigger" in Lin's hearing, the ALJ dismissed Lin's complaint. Evaluating Buckley's conduct from the perspective of a Chinese employee, the ALJ found Lin had not established a hostile work environment claim or a constructive discharge claim.

In a May 6, 2013 decision, the Director came to the opposite conclusion. Treating Lin as the functional equivalent of the protected group targeted by Buckley because she was a member of what the Director termed "a black family," the Director found she had established both a hostile work environment claim and a constructive discharge claim. The Director ordered defendants to cease and desist from violating the LAD. The Director also awarded Lin $25,000 in compensatory damages, and required defendants to pay a $5000 statutory penalty to the State. In a supplemental order dated September 19, 2013, the Director required defendants to pay the State $31,001.55 in counsel fees and $490.50 in costs. Defendants appealed.

II.

We accord "a 'strong presumption of reasonableness' to an administrative agency's exercise of its statutorily delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014). "[T]he Appellate Division's initial review of [the Director's] decision is a limited one. The court must survey the record to determine whether there is sufficient credible competent evidence in the record to support the agency head's conclusions." Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988). "'[T]his standard requires far more than a perfunctory review; it calls for careful and principled consideration of the agency record and findings[.]'" Ibid.

We must give "'due regard also to the agency's expertise.'" Ibid. The Legislature established the Division to administer and enforce the LAD. See N.J.S.A. 10:5-6. "The Division has 'expertise in recognizing acts of unlawful discrimination, no matter how subtle they may be.'" Wojtkowiak v. N.J. Motor Vehicle Comm'n, ___ N.J. Super. ___, ___ (App. Div. 2015) (slip op. at 9) (quoting Clowes, supra, 109 N.J. at 588).

We may reverse the Director's decision only if "the Director's 'finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction.'" Clowes, supra, 109 N.J. at 588. "Under that standard of review, an appellate court will not upset an agency's ultimate determination unless the agency's decision is shown to have been 'arbitrary, capricious, or unreasonable, or [] not supported by substantial credible evidence in the record as a whole.'" Barrick v. State, 218 N.J. 247, 259 (2014). We must hew to our limited standard of review.

III.

Buckley admitted calling the customer's representative a "Jamaican nigger." He conceded he may have said "nigger" in his office and on the staircase near Lin's desk, and may have used "nigger" on occasion in his conversations with Lin's supervisor. However, defendants challenge the Director's finding that, "in addition to the five specific racially hostile incidents cited in the ALJ's decision, [Lin] heard Buckley use the word 'nigger' on other occasions in everyday conversation."

The Director's finding is supported by Lin's testimony that Buckley "uses the word in his everyday . . . conversation." She explained that Buckley was "always screaming and yelling [and] it would be in his conversation at least once." She also

testified that he yelled each day he was in the office, which was usually five days a week, and thus, "when he's in the office you would hear him use the 'N-word.'"

The ALJ found Lin "believed that Buckley used the word 'nigger' in his everyday conversation." The Director noted "the ALJ did not, however, make an explicit finding as to whether Buckley in fact did so." Based on Lin's testimony and its consistency with her statements to the Division's investigator, the Director made that finding explicit. The Director "may reject or modify findings of fact . . . in the [ALJ's] decision, but shall state clearly the reasons for doing so." N.J.S.A. 52:14B-10(c). The Director properly did so here.

Defendants note that the ALJ was in a better position to determine credibility. However, the ALJ made no adverse credibility finding as to Lin, so the Director did "not reject or modify any findings of fact [by the ALJ] as to issues of credibility of lay witness testimony," which requires a greater showing. Ibid. Defendants cite Buckley's testimony that he only rarely used "nigger," but there was no indication the ALJ credited that testimony.

Defendants argue Lin's testimony cannot be credited because she claimed the first "Jamaican nigger" incident occurred in May 2008, at least nine or ten weeks into her sixteen-week tenure at Dane. However, even assuming that was the first time Buckley began using "nigger" in Lin's presence, the remaining six or so weeks gave Buckley ample opportunity to use the word "nigger" on other occasions in everyday conversation.

IV.

In the LAD, the Legislature "declare[d] its opposition to . . . 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, . . . disability or nationality of that person or that person's spouse." N.J.S.A. 10:5-3. The LAD makes it an unlawful employment practice and unlawful discrimination "[f]or an employer, because of [such characteristics] of any individual, . . . to refuse to hire or employ or to bar or to discharge . . . from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." N.J.S.A. 10:5-12(a). "Any person claiming to be aggrieved by an unlawful employment practice or an unlawful discrimination" may file a complaint. N.J.S.A. 10:5-13.

We first address whether Lin is such an aggrieved person, and to what protected group she belongs. As noted above, the ALJ treated Lin only as Chinese, but the Director treated her as the functional equivalent of a black person.

The Director relied on O'Lone v. N.J. Dept. of Corr., 313 N.J. Super. 249 (App. Div. 1998). In O'Lone, we ruled a Caucasian plaintiff "should be treated as if he were in a protected group because he was allegedly terminated for his refusal to stop dating an African-American woman." Id. at 254-55. "Regardless of the race of this plaintiff, he suffered the same injury as a minority when he was discharged for allegedly associating with a member of a protected group." Id. at 255. "[T]o achieve substantial justice, we conclude that where the plaintiff is wrongfully discharged for associating with a member of a protected group, that is the functional equivalent of being a member of the protected group." Ibid.

We followed O'Lone in Berner v. Enclave Condo. Ass'n, 322 N.J. Super. 229 (App. Div.), certif. denied, 162 N.J. 131 (1999). In Berner, a Causcasian plaintiff alleged that he was not permitted to lease his condominium unit to an African-American. Id. at 231-32. We ruled the plaintiff was "directly affected" by the alleged discrimination, because he lost the opportunity to lease the apartment, which cost him three months' rent. Id. at 234 & n.2. We rejected the argument "that a LAD plaintiff need be a member of a protected group" to be "an aggrieved person" under N.J.S.A. 10:5-13. Id. at 234-35.

We distinguished O'Lone and Berner in L.W. ex rel. L.G. v. Toms River Reg'l Schs. Bd. of Educ., 381 N.J. Super. 465, 500-01 (App. Div. 2005), aff'd as modified, 189 N.J. 381 (2007). In L.W., we ruled that even though a mother "was sorely distressed by the harassment of her son" at school for his perceived sexual orientation, she "was not the 'functional equivalent' of a member of th[at] protected group." Ibid. "Therefore, [she] is not an 'aggrieved' person under N.J.S.A. 10:5-13." Id. at 501. We cited, Catalane v. Gilian Instrument Corp., 271 N.J. Super. 476, 500 (App. Div.), certif. denied, 136 N.J. 298 (1994), which held that the LAD did not allow per quod claims by the spouses of discrimination victims because "the Legislature did not intend to establish a cause of action for any person other than the individual against whom the discrimination was directed."

Under these cases, if defendants directly discriminated against Lin because of the race of her fiancé or child, she is an aggrieved person under the LAD, and is treated as a member of their protected racial group. However, she is not an aggrieved person if she merely suffered harm as a result of discrimination directed against her fiancé or child.

Here, Lin claims defendants directly discriminated against her by creating a hostile work environment because of the race of her fiancé and child. Given the nature of Lin's hostile work environment claim, the Director properly treated Lin as a member of their protected racial group to evaluate her claim.

V.

Our Supreme Court has recognized "that allegations of a sexually hostile work environment state a claim under the LAD." Lehmann v. Toys 'R' Us, 132 N.J. 587, 602 (1993). The Court in Lehmann established a test, id. at 603-04, which still governs today. Aguas v. State, ___ N.J. ___, ___ (2015) (slip op. at 9-10). That test "applies generally to hostile work environment claims," Cutler v. Dorn, 196 N.J. 419, 430 (2008), including claims based on race, Taylor v. Metzger, 152 N.J. 490, 498 (1998).

"To establish a cause of action under the LAD based on a hostile work environment, plaintiffs must satisfy each part of a four-part test." Shepherd v. Hunterdon Dev'l Ctr., 174 N.J. 1, 24 (2002). Plaintiffs "must show that the complained-of conduct (1) would not have occurred but for the employee's protected status, and was (2) severe or pervasive enough to make a (3) reasonable person believe that (4) the conditions of employment have been altered and that the working environment is hostile or abusive." Ibid. (citing Lehmann, supra, 132 N.J. at 603-04).

A.

"The first element of the test is discrete from the others. It simply requires that in order to state a claim under the LAD, a plaintiff show by a preponderance of the evidence that she suffered discrimination because of her [protected status]." Lehmann,

supra, 132 N.J. at 604. Here, Lin had to show that Buckley's comments would not have occurred but for her own race or national origin, or the race of her fiancé or child.

Lin established the alleged remark about her "oriental ass" would not have occurred but for her race or national origin. See Flizack v. Good News Home for Women, Inc., 346 N.J. Super. 150, 156, 161 (App. Div. 2001).

It is less clear that Buckley's statements using the word "nigger" would not have occurred but for Lin's race, even treating her as having the same race as her fiancé and son. Buckley contended, and Lin did not deny, that he was not talking to her or referring to her, her fiancé, or her son. Instead, Buckley's comments were made in conversations with others or himself. He used "nigger" when referring to a representative of a customer, a Dane employee, Lin's supervisor, and Dane's lawyer. His other uses of "nigger" had no specified reference.

"Common sense dictates that there is no LAD violation if the same conduct would have occurred regardless of the plaintiff's [protected status]." Lehmann, supra, 132 N.J. at 604. "For example, if a supervisor is equally crude and vulgar to all employees, regardless of their sex, no basis exists for a sexual harassment claim. Although the supervisor may not be a nice person, he is not abusing a plaintiff because of her sex." Ibid. Here, however, four factors combine to support the Director's finding.

First, Lin complained to Buckley that his "Jamaican nigger" comment was "really hurtful" to her because her son was black, as was her fiancé and his family. Thus, Buckley was on notice that Lin perceived his use of the word "nigger" in her hearing as directed at, and abusive to her because of the race of her son and fiancé. See Cowher v.

Carson & Roberts, 425 N.J. Super. 285, 291-92, 296-97 (App. Div. 2012) (holding, where the complainant was mistakenly perceived as Jewish, that an LAD claim can be based on "a perceived characteristic that, if genuine, would qualify a person for the protections of the LAD").[1] Nonetheless, Buckley continued to repeatedly use "nigger" within Lin's earshot.

Second, the nature of the word used must be taken into account. In Lehmann, the Court held that "[w]hen the harassing conduct is sexual or sexist in nature, the but-for element will automatically be satisfied." Lehmann, supra, 132 N.J. at 605. "Thus when a plaintiff alleges that she has been subjected to sexual touchings or comments, or where she has been subjected to harassing comments about the lesser abilities, capacities, or the 'proper role' of members of her sex, she has established that the harassment occurred because of her sex." Ibid.; see Cowher, supra, 425 N.J. Super. at 297 (applying Lehmann's holding to anti-Semitic comments).

The same is true of racist comments. "The meaning of a racial epithet is often a critical, if not determinative, factor in establishing a hostile work environment." Taylor, supra, 152 N.J. at 502. In Taylor, the Court found a hostile work environment because "[t]he term defendant used, 'jungle bunny,' is patently a racist slur, and is ugly, stark and raw in its opprobrious connotation." Id. at 502-03. The Court noted that "'jungle bunny' is similarly disparaging" to "nigger." Id. at 510-11. "'The term "nigger" is one of insult, abuse and belittlement harking back to slavery days.'" Id. at 510. Even if use of such a term "would not have been deemed intolerable one or two generations ago, defendant's behavior is not acceptable today." Id. at 511 n.2.

Third, the Supreme Court has held that a plaintiff claiming a hostile work environment "need not personally have been the target of each or any instance of offensive or harassing conduct." Lehmann, supra, 132 N.J. at 611 (emphasis added). The Court cited federal decisions under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17, holding that """[e]ven a woman who was never herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere where such harassment was pervasive."" Ibid. Because "[t]he plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others," ibid., "[c]ircumstances can give rise to an actionable hostile work environment claim even where the plaintiff was not the 'target' of the offensive or harassing conduct." Cutler, supra, 196 N.J. at 433. Because Lin personally witnessed Buckley's offensive comments by hearing them, they can cause her to experience a hostile work environment. Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286, 320 (2006).[2]

Fourth, an LAD "plaintiff need not show that the employer intentionally . . . intended to create a hostile work environment." Lehmann, supra, 132 N.J. at 604. "The purpose of the LAD is to eradicate discrimination, whether intentional or unintentional. Although unintentional discrimination is perhaps less morally blameworthy than intentional discrimination, it is not necessarily less harmful in its effects, and it is at the effects of discrimination that the LAD is aimed." Id. at 604-05.

Thus, although Buckley may not have intended to create a hostile work environment for Lin, he knew after his "Jamaican nigger" comment that his use of the word "nigger" created such an environment for her. He nonetheless continued to use

"nigger" frequently in her hearing. Even if he did not intend his comments to be directed at her, he forced her repeatedly to experience a patently racist slur directed against her perceived racial group. Giving due regard to the Director's expertise, we cannot say his finding that the but-for prong was satisfied was unsupported by substantial credible evidence or was arbitrary, capricious, or unreasonable.

B.

Under Lehmann's test for a hostile work environment, "the second, third, and fourth prongs, while separable to some extent, are interdependent." Id. at 604. "One cannot inquire whether the alleged conduct was 'severe or pervasive' without knowing how severe or pervasive it must be." Ibid. "The answer to that question lies in the other prongs: the conduct must be severe or pervasive enough to make a reasonable [person in that racial group] believe that the conditions of employment are altered and her working environment is hostile." Ibid.; see Taylor, supra, 152 N.J. at 498.

We need not decide whether Buckley's alleged "oriental ass" remark met these prongs. Even ignoring that comment, the Director could conclude that Buckley's repeated use of the term "nigger" in Lin's earshot was severe or pervasive enough to make a reasonable person in that racial group believe the conditions of her employment were altered and her working environment was hostile.

In Taylor, the Supreme Court held that "a single utterance of an epithet can, under particular circumstances, create a hostile work environment." Taylor, supra, 152 N.J. at 501. Like "jungle bunny," "nigger" "is a slur that, in and of itself, is capable of contaminating the workplace." Id. at 503. "Further, the severity of the remark in this

case was exacerbated by the fact that it was uttered by a supervisor or superior officer." Ibid. It "greatly magnifies the gravity of the comment," and "immeasurably increased its severity" that "the chief executive of the office in which plaintiff worked" was the person uttering this racial epithet. Id. at 503-04.

In Taylor, the single racial comment was made about the plaintiff. Id. at 495. Here, Buckley was referring to other people. "[A] derogatory comment about another person generally does not have the same sting as an ethnic slur directed at a minority group member." Heitzman, supra, 321 N.J. Super. at 148. However, Buckley increased the harm by the quantity of his racial epithets. Buckley repeatedly used "nigger" within Lin's earshot even after Lin complained that she regarded it as hurtful to herself.

We "must consider the cumulative effect of the various incidents, bearing in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes." Lehmann, supra, 132 N.J. at 607 (internal quotation marks omitted). "'Severe or pervasive' conduct, therefore, can be established by citing 'numerous incidents that, if considered individually, would be insufficiently severe.'" Cutler, supra, 196 N.J. at 432 (quoting Lehmann, supra, 132 N.J. at 607). "Racial harassment in the workplace, based on the accumulation of offensive and derogatory comments or supposed 'jokes' uttered in the presence of African-American employees," is sufficient to show a hostile work environment. Id. at 438.

We recognize that "'a plaintiff's subjective response' to the harassment" is not "controlling of whether an actionable hostile environment claim exists." Id. at 431 (quoting Lehmann, supra, 132 N.J. at 613). "Whether harassing conduct makes a work

environment hostile is assessed by use of a reasonable person standard." Ibid. "[T]he proper question in this case is what effect would defendants' derogatory comments have on a reasonable [black person], rather than on a reasonable person of [Lin's] actual background." Cowher, supra, 425 N.J. Super. at 300; see Taylor, supra, 152 N.J. at 498, 506. The Director could find that a reasonable black person "would not have to be thin-skinned to perceive these comments as hostile to" black persons generally or to herself. See Cutler, supra, 196 N.J. at 434.

Further, because Buckley was both the chief executive officer and the "offender, plaintiff could not seek the redress that would otherwise be available to a victim of invidious workplace harassment, namely, resort to her own supervisor." Taylor, supra, 152 N.J. at 505. Indeed, as the ALJ found, Buckley and Lin's supervisor both used the word "nigger." When Lin did complain to Buckley and her supervisor, "she did not receive any redress or protection whatsoever." Ibid. This was directly contrary to their "clear duty not only to take strong and aggressive measures to prevent invidious harassment, but also to correct and remediate promptly such conduct when it occurs" and is reported to the employer. Id. at 504-05.

Finally, we are mindful that the LAD's purpose is "nothing less than the eradication of the cancer of discrimination." Id. at 508 (internal quotation marks omitted). The LAD seeks "to protect not only the civil rights of individual aggrieved employees but also to protect the public's strong interest in a discrimination-free workplace." Lehmann, supra, 132 N.J. at 600. That public interest "'infuses the inquiry.'" Wilson v. Wal-Mart Stores, 158 N.J. 263, 269 (1999).

Given these circumstances, and our limited standard of review, we hold the Director "could reasonably find that the reasonable African American would believe that" Buckley's repeated use of "nigger," including "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." Taylor, supra, 152 N.J. at 506 (citing Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993) ("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.").

Contrary to defendants' claim, the Director's ruling under these circumstances does not convert the LAD into "a sort of civility code for the workplace where only language fit for polite society will be tolerated." Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 549 (2013). As Taylor made clear, "[r]acial epithets [like "nigger"] are regarded as especially egregious and capable of engendering a severe impact." Taylor, supra, 152 N.J. at 502. Moreover, like the Title VII standards, the LAD's "standards for judging hostility" of the work environment "are sufficiently demanding to ensure that [it] does not become a 'general civility code.'" See Faragher v. City of Boca Raton, 524 U.S. 775, 787, 118 S. Ct. 2275, 2283-84, 141 L. Ed.2d 662, 677 (1998).

VI.

The Director also found that defendants constructively discharged Lin. "[A] constructive discharge claim requires more egregious conduct than that sufficient for a hostile work environment claim," because "constructive discharge requires not merely

'severe or pervasive' conduct, but conduct that is so intolerable that a reasonable person would be forced to resign rather than continue to endure it." Shepherd, supra, 174 N.J. at 28. "'A trial court should consider the nature of the harassment, the closeness of the working relationship between the harasser and the victim, whether the employee resorted to internal grievance procedures, the responsiveness of the employer to the employee's complaints, and all other relevant circumstances.'" Ibid.

Considering the circumstances above, the Director found "Buckley's repeated use of the racial slur in a short time period, in both angry rants and more casual conversation, cannot be characterized as anything but egregious." The Director pointed out that Buckley and Lin "worked in close proximity in a small house-turned-office at least four days a week," and that Lin "used all the internal grievance procedures available to her." The Director found:

> With no further avenues available to stop the racial slurs, a reasonable employee in her circumstances, working in close quarters with a boss who uses the racial slur freely and with impunity and an immediate superior who refuses to intervene, might well feel compelled to resign rather than endure the continuing racial hostility.

The Director's findings support the conclusion "'employer knowingly permit[ted] conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." Id. at 27-28 (internal quotation marks omitted); see Muench v. Twp. of Haddon, 255 N.J. Super. 288, 302 (App. Div. 1992). The repeated

and unrelenting use of a patently racial slur here cannot be analogized to the "lack of civility" and other conduct found inadequate for constructive discharge in Shepherd, supra, 174 N.J. at 25-26, 29.

Defendant challenge the credibility of Lin's testimony that the racial slurs caused her to suffer hives and depression. However, constructive discharge is based on an objective, "reasonable person" standard. Shepherd, supra, 174 N.J. at 28; see Donelson v. DuPont Chambers Works, 206 N.J. 243, 266-67 (2011). In any event, Lin's fiancé confirmed the use of "nigger" at Dane made Lin "very upset" and "depressed," causing her to suffer hives. His sister also corroborated that Lin was "very unhappy" about the racial slurs. Defendants claim Lin's testimony about when those symptoms began was inconsistent with the testimony of her fiancé and his sister. However, their estimates of when Lin "began to complain" or "talk . . . about her experience" were vague and were not irreconcilable with Lin's testimony. In any event, the ALJ or the Director were not required to discredit Lin's testimony if it was inconsistent with other witnesses.

Defendants cite the ALJ's conclusion there was no constructive discharge, but that was primarily based on the ALJ's finding of no hostile work environment, which the Director could properly reject. The ALJ offered an alternative hypothesis that Lin "may have intended to resign 'for reasons other than the complained-of violations'" (quoting Shepherd, supra, 174 N.J. at 29) because she left work when her son's school year ended. However, Lin testified that she transferred her son to a school near Dane at Buckley's suggestion, and that when her work environment became intolerable she "left the same day my son was graduating from the school so that we could be done over there." The

Director could find Lin's resignation was caused by the hostile work environment and affected her son's schooling, rather than the reverse.

Defendants note "'an employee has the obligation to do what is necessary and reasonable in order to remain employed rather than simply quit.'" Id. at 28. However, Lin testified she complained twice to Buckley and twice to her supervisor, to no avail. Defendants fail to posit what more Lin could have done to end the racial slurs.

Thus, the Director's determination of constructive discharge was supported by substantial, credible evidence. With deference to the Director's expertise, we cannot say his determination was arbitrary, capricious, or unreasonable. We also note that the Director's denial of back pay, because of Lin's inadequate job search, reduces the significance of the constructive discharge issue. See Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 277 (App. Div. 1996).

VII.

Defendants next challenge the Director's award of $25,000 in pain and humiliation damages. Based on older cases, defendants argue that the Director could award such damages in only incidental amounts, not as the primary relief. However, the Legislature amended the LAD in 1990 to reject the theory "that monetary awards were a secondary, rather than co-equal, form of remedy under the LAD." Tarr v. Ciasulli, 181 N.J. 70, 96 (2004); see N.J.S.A. 10:5-3. The Legislature again amended the LAD in 2003 to provide "a prevailing complainant may recover damages to compensate for emotional distress caused by [LAD violations] to the same extent as is available in common law tort actions," which have no limit on the amount of emotional distress damages. N.J.S.A.

10:5-17; see L.W., supra, 381 N.J. Super. at 499-500. Pain and humiliation have long been recognized as "component[s] of various intentional torts," and as available damages under the LAD. Tarr, supra, 181 N.J. at 77-82.

To support the award, the Director cited Lin's testimony that when Buckley used the word "nigger" she felt like she was being stabbed, and that she cried at work, lost sleep, broke out in hives, snapped at her son, and became angry and depressed. An LAD plaintiff may prove damages for past emotional distress without expert testimony and without seeking medical treatment. Id. at 99; see Battaglia, supra, 214 N.J. at 552.

The Director has "unique discretion and expertise to effectuate fully the 'make-whole' policy of the [LAD]." Terry v. Mercer Cnty. Bd. of Chosen Freeholders, 86 N.J. 141, 157 (1981). "A pain and suffering award is reviewed to determine whether it is fair and reasonable." Klawitter v. City of Trenton, 395 N.J. Super. 302, 336 (App. Div. 2007). Here, the Director considered awards for emotional distress made to other prevailing complainants. See, e.g., id. at 335-36 (upholding a $79,538 award); L.W., supra, 381 N.J. Super. at 500 (upholding a $50,000 award). We cannot say the Director's $25,000 award for emotional distress was excessive.

VIII.

Lastly, defendants claim the Director's $31,001.58 award of counsel fees was excessive. N.J.S.A. 10:5-27.1 provides that "[i]f the complainant's case was presented by the attorney for the division and the complainant prevailed, the reasonable costs, including attorney fees, of such representation may be assessed against a nonprevailing respondent." The attorney for the Division certified that she spent 206.9 hours, which

the Director reduced to slightly more than 200 hours to remove time spent on Lin's unsuccessful request for back pay. The Director multiplied that by an hourly rate of $155. See Rendine v. Pantzer, 141 N.J. 292, 334-35 (1995). The Division's attorney certified that $155 was the hourly rate for a Deputy Attorney General (DAG) of ten years of experience under the Attorney General's "Division of Law Attorneys Fees Rates."

Defendants did not challenge that hourly rate before the Director, who found the rate to be reasonable. Nonetheless, on appeal defendants complain that this rate does not reflect the State's cost if a DAG's annual salary is converted to an hourly rate. However, "'[g]enerally, a reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community.'" Rendine, supra, 141 N.J. at 337. The Attorney General designed the fee rates to approximate the prevailing market rates, and defendants admit the $155 hourly rate "might well be a reasonable market rate for private practitioners in New Jersey." Accordingly, defendants cannot show the Director plainly erred in finding that the rate was reasonable. See id. at 325 (noting that Blum v. Stenson, 465 U.S. 886, 895-96, 104 S. Ct. 1541, 1547, 79 L. Ed.2d 891, 900 (1984), held that "reasonable fees" under a federal civil rights statute "are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel").

Affirmed.

1 Thus, the circumstances here bear no resemblance to the situation where a plaintiff "never complained to anyone about the alleged anti-Semitic comments upon which he now grounds his hostile work environment discrimination claim." Heitzman v. Monmouth Cnty., 321 N.J. Super. 133, 149 (App. Div. 1999).

2 Because we are bound by our Supreme Court's interpretation of the LAD, we must reject the reliance by defendants and the ALJ on the ruling in Caver v. City of Trenton, 420 F.3d 243 (3d Cir. 2005), that plaintiff Davis could not "meet the first element of the hostile work environment claim under Title VII or the LAD - causation - solely by pointing to comments that were directed at other individuals." Id. at 263. Unlike Lin, Davis apparently never complained to his police superiors that he regarded their racial comments to prisoners or others as directed at him, and he only heard second-hand about racist graffiti and flyers. See id. at 249. In any event, no "federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state." Johnson v. Fankell, 520 U.S. 911, 916, 117 S. Ct. 1800, 1804, 138 L. Ed.2d 108, 115 (1997).
