

CASE NOTES

L.W. ex rel. L.G. v. Toms River Regional Schools Board of Education: New Jersey Leads the Way for Harassment Free Education

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I. INTRODUCTION

The mother of a high school student, L.W., brought an action on his behalf against the Toms River Regional Schools Board of Education (Toms River) for failing to take action in response to harassment of L.W. based on his perceived sexual orientation.¹ The action was brought under the New Jersey Law Against Discrimination (LAD).² Harassment of L.W. began in the fourth grade when classmates first started calling him names such as “gay,” “homo,” and “fag.”³ School officials first learned of the problem when L.W. was in the fifth grade.⁴ After one incident, L.W. refused to attend school and the other students wrote letters of apology, but upon returning to school, the harassment continued.⁵

The harassment only increased as L.W. advanced through school.⁶ By the seventh grade, L.W. was being subjected to daily bullying and “physical aggression” from other students.⁷ L.W. did not report every bullying incident that occurred, including one where a note calling him a “faggot” and telling him to leave school was taped to his locker.⁸ The first reported incident took place in the school cafeteria where L.W. was surrounded by a group of students, taunted, and struck on the back of his head.⁹ The school talked to those responsible about the inappropriateness of their actions and warned them of future consequences if another

1. *L.W. ex rel. L.G. v. Toms River Reg’l Schs. Bd. of Educ.*, 915 A.2d 535, 540 (N.J. 2007).

2. *See id.*

3. *Id.* at 539.

4. *See id.* at 540.

5. *See id.*

6. *See id.* at 539.

7. *Id.*

8. *Id.* at 540.

9. *See id.*

incident occurred.¹⁰ As the taunts continued throughout middle school, L.W. continued to report them, and each time the school would speak to those responsible and warn them of future consequences if they were involved in another incident.¹¹ After an incident in the cafeteria in which a student approached L.W. in the lunch line, called him “gay” and “faggot,” and proceeded to “hump” him, the school implemented a stricter policy to deal with the incidents.¹² An “open-door policy” was introduced, where L.W. would be allowed to leave class to report problems, and the harassing students would be dealt with immediately, first with counseling, and then more drastic action.¹³

After entering high school, the taunts and physical aggression resurfaced.¹⁴ L.W. was subjected to increasingly violent assaults, including one where he was threatened and punched in the face and another where he was completely covered in dirt.¹⁵ After a number of these attacks, which resulted in suspensions and, in one case, criminal charges for the aggressors, L.W. left the Toms River school district to attend school elsewhere.¹⁶

The complaint filed by L.W.’s mother on his behalf alleged that Toms River violated the LAD by not taking corrective action after L.W. was repeatedly subjected to harassment due to his perceived sexual orientation.¹⁷ After a three-day administrative hearing, the Administrative Law Judge (ALJ) found that a cause of action against the school district for student-on-student harassment was not covered under the LAD.¹⁸ The ALJ also determined, “even assuming that the LAD recognized such a cause of action,” the claim should be governed by Title IX standards, which prohibits sexual harassment in any federally funded education program.¹⁹ Title IX would permit a liability claim only if Toms River had acted with “deliberate indifference.”²⁰

The director of the Division of Civil Rights reviewed and rejected the findings of the ALJ, finding the LAD did permit a claim against the school district, and found in favor of L.W., granting emotional distress

10. *See id.* at 541.

11. *Id.*

12. *Id.*

13. *Id.* at 541-42.

14. *See id.* at 543.

15. *See id.*

16. *See id.*

17. *See id.* at 544.

18. *See id.*

19. *Id.*

20. *Id.* (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999)).

awards to both L.W. and his mother.²¹ The appellate division affirmed the ruling in part but reversed the director's award to the mother.²² Toms River appealed the decision to the New Jersey Supreme Court arguing the LAD does not provide a cause of action against it for student-on-student harassment, and if it does, that it took the appropriate remedial measures to address the problem and should not be held liable.²³ The New Jersey Supreme Court *held* that a student may bring a cause of action against a school district for student-on-student sexual orientation harassment and that the school district may be held liable when it does not take reasonable measures, judged by the totality of the circumstances, to end the harassment. *L.W. ex rel. L.G. v. Toms River Regional Schools Board of Education*, 915 A.2d 535, 540 (N.J. 2007).

II. BACKGROUND

The LAD was the first state antidiscrimination statute when it was passed in 1945.²⁴ As the *Toms River* court pointed out:

The LAD provides, in pertinent part: All persons shall have the opportunity to . . . obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, nationality, sex or source of lawful income used for rental or mortgage payments. . . . This opportunity is recognized as and declared to be a civil right.²⁵

The intent of the legislature in enacting this statute was to do nothing short of eradicate discrimination in the state.²⁶ While the statute is silent on the subject of sexual harassment, the New Jersey Supreme Court has looked to federal precedent governing Title VII of the Civil Rights Act of 1964 to interpret its language.²⁷ Using Title VII as guidance, the New Jersey Supreme Court held that the LAD does protect against sexual harassment when it creates a hostile environment in the work place.²⁸ In

21. *Id.* at 544-45.

22. *Id.* at 545 (citing *L.W. v. Toms River Reg'l Schs. Bd. of Educ.*, 886 A.2d 1090 (N.J. App. Div. 2005)).

23. *Id.*

24. *Viscik v. Fowler Equip. Co.*, 800 A.2d 826, 832 (N.J. 2002).

25. *Toms River*, 915 A.2d at 546 (quoting N.J. STAT. ANN. § 10:5-4 (2007)).

26. *See Lehmann v. Toys R Us, Inc.*, 626 A.2d 445, 451 (N.J. 1993).

27. *Id.* at 452.

28. *See id.*

general, New Jersey courts have held that the LAD should be construed liberally in order to achieve its goal of eliminating discrimination.²⁹

The LAD makes it unlawful to discriminate in a place of public accommodation.³⁰ The term “place of public accommodation” has been recognized to include any educational institution under the supervision of the State Board of Education.³¹ In an effort to have the greatest antidiscrimination impact, the New Jersey Supreme Court has found that places of public accommodation are not limited to those that are listed in the statute, and that those similar in nature to the places listed are also covered under the LAD.³²

In *Lehmann v. Toys R Us, Inc.*, the New Jersey Supreme Court established the liability standard under the LAD for employers in sexual harassment and hostile work environment claims.³³ The court found that when an employer knows, or should have known of harassment or the creation of a hostile work environment and fails to take effective measures to stop it, the employer becomes a contributor to the creation of the hostile environment and may be held liable.³⁴ Though the court has established this standard for an employer’s liability, they have not established a standard of liability for nonemployers who are covered under the LAD.

As noted above, when interpreting the LAD, the New Jersey Supreme Court has in the past looked to federal jurisprudence governing Title VII.³⁵ Despite its willingness to consider interpretations of similar federal statutes, the New Jersey Supreme Court has explicitly stated that it does not hesitate to depart from federal standards when their application is not appropriate under the circumstances.³⁶

III. COURT’S DECISION

In the noted case, the New Jersey Supreme Court extended its hostile work environment and sexual harassment standard, promulgated in *Lehmann*, to include harassment in a school environment.³⁷ The court applied the employer liability standard from *Lehmann*, which holds

29. See *Ptaszynski v. Uwaneme*, 853 A.2d 288, 297 (N.J. Super. Ct. App. Div. 2004).

30. See *id.* at 295.

31. See *id.* at 295-96.

32. See *id.*

33. 626 A.2d 445, 448 (N.J. 1993).

34. See *id.* at 464.

35. See *id.* at 452.

36. See *id.*

37. See *L.W. ex rel. L.G. v. Toms River Reg’l Schs. Bd. of Educ.*, 915 A.2d 535, 549 (N.J. 2007).

employers liable when they have actual or constructive knowledge of harassment and a hostile work environment, and fail to enact adequate measures to stop it.³⁸ The court followed the basic holding of *Lehmann*, but modified the standard to apply to a school setting.³⁹

The first decision the court had to make in this appeal was “whether the LAD recognizes a cause of action against a school district for student-on-student harassment based on perceived sexual orientation.”⁴⁰ To make this determination, the court looked at the language of the statute.⁴¹ The court found that based on the LAD’s broad goal of eradicating all discrimination and the prevalence of peer-on-peer sexual orientation harassment, there is a cause of action against a school district when it fails to “reasonably address” the harassment.⁴² The court determined that permitting a cause of action against a school district under the LAD would allow courts to address a significant harassment problem facing the educational system in New Jersey.⁴³

After determining L.W. had a cause of action against Toms River, the court turned next to applying the *Lehmann* standard of liability. The court found that a school district may be found liable under the LAD for student-on-student sexual orientation harassment when the school “knew or should have known of the harassment, but failed to take action reasonably calculated to end the harassment.”⁴⁴ The court noted that it did not create a strict liability standard.⁴⁵ Because of this, schools will not be held liable for their failure to eradicate all peer harassment, but will be required to implement reasonable measures to prevent it.⁴⁶ The court also cautioned that a school is not the same as a workplace and, when evaluating whether a school took reasonable steps to prevent the harassment, the deciding court should look at the totality of the circumstances.⁴⁷

It was maintained by Toms River that the court should not extend the *Lehmann* standard of liability to schools, but instead should establish a standard that mirrored the “deliberate indifference” standard applied in

38. *See id.* at 550.

39. *See id.*

40. *Id.* at 546.

41. *See id.* at 547.

42. *Id.*

43. *See id.* at 546-47.

44. *Id.* at 550.

45. *See id.*

46. *See id.*

47. *See id.* at 550-51.

federal Title IX cases.⁴⁸ Title IX of the Education Amendments of 1972 protects against discrimination on the basis of sex in any educational program receiving federal funding.⁴⁹ Toms River urged the court to follow federal jurisprudence on this matter, as they had done in the past.⁵⁰ The court rejected this argument, however, noting that they may look to federal jurisprudence for guidance when interpreting the LAD, but that they are not bound to federal precedent when it is inappropriate under the circumstances.⁵¹ In the noted case, the court found it unnecessary to impose two different standards of liability for workplaces and schools.⁵² In coming to this conclusion, the court noted several differences between the LAD and Title IX that made applying the Title IX standard inappropriate.⁵³ First, the LAD provides protection against discrimination on a wider basis than Title IX.⁵⁴ Second, Title IX only applies to educational programs, whereas the LAD applies to all places of public accommodation.⁵⁵ Finally, the court noted that the LAD, unlike Title IX, provides an express private right of action.⁵⁶ Because of these differences, and the difference between the Title IX and *Lehmann* liability standards, the court found application of the “deliberate indifference” standard inappropriate.⁵⁷

After having established the standard courts are to follow when evaluating a claim of this nature against a school district, the court remanded the case to the Director of the Division of Civil Rights with direction to allow the parties to be heard on the new standard of liability.⁵⁸ In this light, the court noted that when evaluating the reasonableness of Toms River’s actions to end the harassment, the administrative court should review how the New Jersey Department of Education advises school districts to act in similar situations and compare those standards to the actions taken by Toms River.⁵⁹ Finally, the court reiterated that all circumstances should be evaluated when judging the reasonableness of any school’s actions, and that the school should be “shielded from

48. *Id.* at 548 (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642-43 (1999)).

49. *See id.* (citing 20 U.S.C.A. § 1681(a)).

50. *See id.* (citing *Davis*, 526 U.S. at 632).

51. *See id.* at 549.

52. *See id.*

53. *See id.*

54. *See id.*

55. *See id.*

56. *See id.*

57. *Id.*

58. *See id.* at 552.

59. *See id.* at 553.

liability” when its remedial actions were reasonable for those circumstances.⁶⁰

IV. ANALYSIS

With this ruling, the New Jersey Supreme Court has surpassed the protections provided by the federal government when it comes to sexual harassment on the basis of perceived or actual sexual orientation and continued its tradition as a pioneer in the area of discrimination protection. The United States Supreme Court has determined that there is an “implied right of action” for an injured person to sue for a violation of Title IX.⁶¹ With the LAD, however, New Jersey has expressly provided a channel for injured “persons to file private causes of action seeking a full range of legal and equitable remedies.”⁶²

The ability both to bring a claim against a school district for student-on-student harassment and to prove that claim is significantly easier under the LAD than under Title IX. The United States Supreme Court first established that a student may bring a cause of action for student-on-student harassment in 1999, in *Davis v. Monroe County Board of Education*.⁶³ The Court, in making that decision, found a school may only be held liable under Title IX when it displays deliberate indifference towards the harassment.⁶⁴ The decision did leave open the possibility of bringing suits for harassment on the basis of sexual orientation.⁶⁵

Title IX, however, poses additional obstacles for students to recover for sexual orientation harassment, which have been alleviated for claims under the LAD based on the New Jersey Supreme Court’s decision. Title IX does afford students a cause of action against their school for “deliberate indifference to known acts of peer sexual harassment,” but under this act, the protection is not automatically extended to homosexual students being harassed on the basis of their sexuality.⁶⁶ Courts look to the Title VII definition of workplace harassment, which does not protect against sexual orientation harassment, when deciding what type of harassment is covered under Title IX.⁶⁷ This statutory

60. *Id.*

61. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 65 (1992).

62. *Toms River*, 915 A.2d at 549.

63. See Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX To Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN’S L.J. 125, 132 (2000).

64. *See id.*

65. *See id.*

66. *Id.* at 139 (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999)).

67. *See id.*

interpretation problem is not an issue with claims made in New Jersey under the LAD. As the court notes, the LAD provides for a cause of action, whereas federal courts have found Title IX does not.⁶⁸ Even if the LAD did not expressly protect against sexual orientation discrimination, the court made it clear that it would not be bound by interpretations of federal statutes, and it still would have been free to find a cause of action under the LAD.⁶⁹

The other, and arguably more significant, difference between a claim under the LAD, as opposed to Title IX, for sexual orientation discrimination is the standard of liability to which the school district will be held. The New Jersey Supreme Court has made recovery by injured persons significantly more attainable by establishing a standard which holds the school district liable for not taking reasonable measures to stop sexual orientation harassment of which it was, or should have been, aware.⁷⁰ Under the more stringent “deliberate indifference” standard established for liability under Title IX, claimants in New Jersey would have to prove the school district knowingly ignored the problem, and that any remedial measures to stop the harassment were clearly unreasonable.⁷¹ In addition to showing the indifference was intentional, the injured student must also prove the indifference “effectively ‘caused’ the discrimination.”⁷²

Had the New Jersey Supreme Court chosen this standard, as *Toms River* urged, it would have been far more difficult for L.W., or any plaintiff in the future, to succeed on his claim. A plaintiff, like L.W., would have to show that he or she would not have suffered the student-on-student harassment had it not been for the indifference of the school. Clearly this is a more difficult claim to prove than to show the school failed to take reasonable measures to stop the harassment. The distinction between the two standards gives students suffering from sexual orientation harassment in school in New Jersey a clear advantage when making their claims under the LAD as opposed to students trying to succeed in claims under Title IX.

With this ruling, and the LAD itself, New Jersey is at the forefront of harassment protection for homosexual students. Many states have statutes prohibiting sex discrimination in schools, but only a small

68. *Toms River*, 915 A.2d at 546.

69. *See id.* at 549.

70. *See id.* at 550.

71. Rebecca Oleksy, *Student-on-Student Sexual Harassment: Preventing a National Problem on a Local Level*, 32 SETON HALL L. REV. 230, 243 (2001).

72. *Id.* (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642-43 (1999)).

minority of those states, New Jersey being one, identifies sexual orientation as a “protected classification.”⁷³ The LAD goes even further than most statutes by expressly protecting against harassment based on perceived sexual orientation.⁷⁴ When a statute does not expressly protect against sexual orientation discrimination, it is very likely that courts will find the statute does not encompass such harassment and the harassed student will be left with little to no legal recourse.⁷⁵ Because of this ruling by the New Jersey Supreme Court, students in New Jersey will now have a channel to enforce their right to an education free of harassment.

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73. Eisemann, *supra* note 63, at 133.

74. *Toms River*, 915 A.2d at 546.

75. *See* Eisemann, *supra* note 63, at 133.

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