

# Appellate Division Vacates A \$3.5 Million Verdict In A Racial Discrimination Suit

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In an unpublished decision, *Milutin v. Department of Corrections* ( A-3387-15T1), the Appellate Division held that several improper evidentiary rulings by the trial court in a racial discrimination suit by a Caucasian corrections officer against the Department of Corrections (“DOC”) deprived the DOC of a fair trial. Based on the erroneous rulings, the Appellate Division remanded the case for a new trial after the jury rendered a verdict in favor of the plaintiff and awarded him more than \$3.5 million in damages. In the lawsuit, the plaintiff alleged that his supervisors and sergeants at the boot camp where he was working made racially derogatory comments towards him, and that he was subjected to disciplinary action and transferred to another facility for discriminatory and retaliatory reasons.

In reversing and remanding the case, the Appellate Division first ruled that the trial court abused its discretion when it barred a sergeant’s report regarding concerns he had with an incident where the plaintiff performed an instant corrective action (“ICA”), which consisted of physical exercises for forty-five to sixty-minutes, on the entire company of cadets at the boot camp. The Appellate Division held that the trial court improperly barred the report as hearsay because the report was admissible under the business records hearsay exception. The Appellate Division ruled that the report was also admissible as a non-hearsay statement to show that the DOC transferred the plaintiff to another facility after the ICA incident for legitimate, non-discriminatory reasons.

The Appellate Division further held that the trial court abused its discretion when it permitted the plaintiff’s psychological expert to testify as to the plaintiff’s credibility. Specifically, the expert testified that the plaintiff was absolutely credible and was a “very honorable man” who “would have a hard time lying.” The Appellate Division found that this testimony constituted impermissible bolstering of the plaintiff’s credibility. Although the trial judge instructed the jury in his final charge that credibility was solely an issue for the jury, the Appellate Division held that this charge was insufficient to cure the error given the passage of time between the testimony and the instruction.

Additionally, the Appellate Division found that the trial court committed reversible error when it allowed propensity evidence to be admitted regarding a supervisor. On cross-examination, the supervisor was asked about, among other things, his involvement in forming a solely African-American community within the town where he grew up and about a quote attributed to him in an article regarding bias and racism in the criminal justice system. The Appellate Division noted that even though the plaintiff testified that the supervisor made racial remarks on numerous occasions, the supervisor was never asked on direct examination about the racial remarks. Accordingly, as the supervisor never explicitly denied making racial comments, it was not only prejudicial to introduce the evidence to attack the supervisor's credibility but unnecessary because whether the supervisor made racial remarks was not at issue.

The Appellate Division determined that another abuse of discretion by the trial court was permitting a comment during the plaintiff's counsel's summation that the plaintiff's supervisor "blamed racist white cops for the reason why jails are over populated with African-American inmates." The Appellate Division opined that this statement should have been excluded as inflammatory and unduly prejudicial because "[a]ny relevance that statement had was outweighed by the substantial prejudice it could have engendered."

Lastly, the Appellate Division concluded that the trial court erred by admitting testimony about racial comments made outside the plaintiff's presence. The Appellate Division noted that according to applicable case law, to establish a hostile work environment, the plaintiff must present evidence of harassing conduct that he witnessed. Therefore, the Appellate Division held that the trial court abused its discretion in admitting evidence of specific racial comments that were directed at other employees and not witnessed by the plaintiff. This case highlights the importance of proper evidentiary rulings in ensuring fair trials.