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3 Takeaways As Calif. High Court Allows Suit Over Single Slur

By **Vin Gurrieri**

Law360 (August 2, 2024, 7:50 PM EDT) -- The California Supreme Court recently held that a single racial slur by a worker's peer can be the basis for a harassment suit under state law, a ruling that attorneys say is "historic" and stands as a warning to employers to take any instances of race-based misconduct seriously.

The California Supreme Court held that an isolated act of harassment can be actionable under the California Fair Employment and Housing Act if it is severe enough "in light of the totality of the circumstances," and that a single use of an "unambiguous racial epithet" can meet that standard. (AP Photo/Eric Risberg, file)

In a **unanimous ruling** written by Associate Justice Kelli M. Evans, the state high court on July 29 revived a race bias suit brought by Twanda Bailey against the San Francisco District Attorney's Office alleging that a coworker's one-time use of the N-word created a hostile work environment in violation of the California Fair Employment and Housing Act.

The state high court held that an isolated act of harassment can be actionable under FEHA if it is severe enough "in light of the totality of the circumstances," and that a single use of an "unambiguous racial epithet" can meet that standard.

Michael Rubin of plaintiffs' side firm Altshuler Berzon LLP said the ruling's impact will be "long-lasting" and that the precedent set by the state's high court will "significantly increase the deterrent effects" of FEHA.

"Too often in the past, employers have been dismissive of workers' complaints about racist comments, characterizing them as isolated incidents, mere bantering, or inoffensive name-calling among members of the workplace 'family,'" Rubin said. "Bailey recognizes the real-world impacts of racism, and the practical reality that racist slurs can cause indelible harm, especially in an already-fraught workplace environment."

"After Bailey, employers will need to take complaints about racist epithets, slurs, and graffiti in the workplace far more seriously and must meaningfully investigate and address such complaints to avoid statutory liability. And that's a good thing," he added.

Karen Wentzel, a California-based management-side of counsel at Squire Patton Boggs, said the decision "underscores employers' responsibility to maintain a respectful workplace" that is free of bias and harassment regardless of location.

"This is true not just as between employees and their supervisors, but also between coworkers, whether the harassing behavior occurs in the lunchroom, a private office or on a personal social media account," Wentzel said.

Here, Law360 experts discuss three takeaways from the California Supreme Court's decision.

"Historic" Victory That Clears Path For Harassment Claims

Bailey, who is Black, sued the SFDA in December 2015 alleging she was subjected to unlawful race harassment and retaliation. The suit centered around an incident in early 2015 in which Bailey said she was "startled" by a mouse, and her fellow investigative assistant with whom she shared an office, Saras Larkin, said, "You [N-word]s is so scary."

Although Bailey didn't initially report the comment, she eventually met with a human resources director and the office's assistant finance chief, according to background details of the case laid out in the high court's decision.

Larkin during that meeting denied making the comment and Bailey ultimately went on leave because of work-related stress.

Bailey alleged that she was also told not to discuss the incident with others because that would create a hostile work environment for Larkin, and that a human resources manager also threatened Bailey that she was "going to get it." Ultimately, human resources declined to investigate after concluding the allegations were "insufficient," according to court documents.

A state court judge awarded the DA's office summary judgment, and California's First Appellate District **upheld that ruling** in 2020.

But in its July 29 ruling, the California Supreme Court said there "is no question that conduct by coworkers may give rise to a claim of harassment," and there is no "magic number of slurs that creates a hostile work environment."

The severity of harassment, the justices said, should be judged "from the perspective of a reasonable person in the plaintiff's position."

"We join the chorus of other courts in acknowledging the odious and injurious nature of the N-word in particular, as well as other unambiguous racial epithets," the justices said. "The N-word carries with it, not just the stab of present insult, but the stinging barbs of history, which catch and tear at the psyche the way thorns tear at the skin."

The state high court left it to jurors to decide whether Larkin's single use of the racial slur was severe enough under the circumstances to have created a hostile work environment for Bailey. It also said the jurors should decide Bailey's retaliation claim.

Stacy Villalobos, senior staff attorney and director of the racial economic justice program at Legal Aid at Work, which filed an amicus brief in conjunction with 10 civil rights organizations in support of Bailey, called the ruling "historic" and one that will greatly benefit workers.

"This is, as far as we know, the first time a court, any court, has ever held that a coworker's single

utterance of an [unambiguous] racial epithet can constitute actionable harassment," said Villalobos, who also participated in oral arguments in the case. "So I think that this decision will really go a long way towards ensuring that workers are able to take their harassment cases to a jury of their peers and access justice in a way that our anti-discrimination laws really intended."

Felicia Gilbert, co-leader of Sanford Heisler Sharp LLP's discrimination and harassment practice, called the ruling a game-changer for the plaintiffs side of the employment bar and will give workers' who've experienced incidents similar to Bailey a better chance of getting their claims before a jury.

"I cannot underscore how important this decision is. It really brings us one step closer to bringing legal jurisprudence, particularly in the state of California, a bit more in step with the realities of racial discrimination in the workplace," Gilbert said. "They know they're being treated differently as a result of their race and there's no recourse because of the unreasonably high bar that plaintiffs and their attorneys have had to contend with to date, even in California, a state that's supposed to be more plaintiff-friendly than others. So to me given the work that I do, this is just absolutely huge."

Peer-On-Peer Harassment Shouldn't Be Minimized

One of the notable elements in the California Supreme Court's decision was its analysis for how courts should delineate between situations in which a person's supervisor is the alleged harasser and cases in which the accused harasser lacks any supervisory authority.

The justices agreed with Bailey that the intermediate appeals court that ruled against her placed too much weight on the fact that Larkin, a coworker, used the slur as opposed to a supervisor.

Legal precedent pertaining to FEHA, which "emphasizes the need to consider the totality of the circumstances when assessing the severity of harassment," does not "support a rule based on this distinction," the state high court said.

The justices did acknowledge that the identity of the speaker could be used to assess the severity of alleged harassment, it doesn't need to be a dispositive element. A "rigid distinction" between supervisors and coworkers doesn't take the full context of a workplace into account, and such a rule potentially overlooks "informal workplace relationships" in which a person without supervisory authority can still exert influence beyond what an organizational chart might show, the justices said.

Gilbert of Sanford Heisler noted the California Supreme Court move to make it "unequivocally clear that conduct by a coworker is enough to give rise to a claim of harassment," is a key element that makes the decision a win for workers in the state.

She said that's because the "most egregious" discriminatory conduct that people experience and that impact their working conditions "often come from their peers." She also noted that supervisors often receive training and are "typically a bit more mindful" of what they say and how they communicate.

"This opinion is monumental because it elucidates that going forward, at least in California, employers are no longer able to shield themselves from liability simply on the basis that an egregiously discriminatory comment or an egregiously discriminatory incident came from … the plaintiff's colleague as opposed to someone in management," Gilbert said.

Additionally, Wertzel of Squire Patton Boggs said the state high court's ruling also highlights the importance of employers having "strong policies and training for managers to ensure that when bad behavior does occur, there are multiple avenues for employees to report the behavior without retaliation."

"Ultimately, policies can't just be words on the paper, they have to be carried out and modeled by the leaders in the organization," Wentzel said.

Case May be Cited Frequently

While the single incident alleged in Bailey's case was a colleague's use of the N-word, attorneys told Law360 the state high court's ruling is worded in such a way that will likely result in it being cited in cases that allege a wide range of isolated yet pernicious harassment.

The court's use of "unambiguous racial epithets" is important phrasing that indicates the ruling is aimed at encompassing more harassing speech than the slur at issue in Bailey's case, Villalobos said.

"That, to me, suggests that the court intends for its opinion to reach not only the N-word, which is the specific factual pattern in this case, but also other unambiguous epithets targeting other racial groups," she said. "I think it seemed very intentional, and they did in a few places in the decision … use the language 'unambiguous racial epithets,' and [did] not just limit their decision to the N-word."

Gilbert similarly said she was optimistic that the ruling will lead plaintiffs' lawyers and courts when confronted with allegations of single-incident harassment to lean on the precedent of the Bailey decision.

That includes cases alleging especially harmful slurs, jokes, epithets or symbols aimed at racial minorities, people of particular religious denominations, people with disabilities.

"I believe it would be squarely within the ambit and intent of [Bailey] to apply the single-instance by a coworker standard to those other instances … beyond the N-word and beyond epithets or slurs that have been used simply to target black people in this country," Gilbert said.

The case is Twanda Bailey v. San Francisco District Attorney's Office et al., case number S265223, in the Supreme Court of California.

--Additional reporting by Hailey Konnath. Editing by Amy Rowe and Nick Petruncio.
