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Calif. High Court Says Co-Worker's Slur Can Be Harassment

By **Hailey Konnath**

Law360 (July 29, 2024, 10:53 PM EDT) -- The California Supreme Court on Monday revived a race bias suit brought by a longtime employee of the San Francisco District Attorney's Office, finding that her co-worker's one-time use of a racial slur may indeed have been so severe that it created a hostile work environment.

The high court unanimously reversed a California Court of Appeal ruling to the contrary, and held that an isolated act of harassment could be actionable under the California Fair Employment and Housing Act if it is "sufficiently severe in light of the totality of the circumstances." A co-worker's use of an unambiguous racial epithet, like in Twanda Bailey's case, "may be found to suffice," the state high court said.

Writing on behalf of the court, Associate Justice Kelli M. Evans said that there "is no question that conduct by coworkers may give rise to a claim of harassment."

"Nor is there a magic number of slurs that creates a hostile work environment," she said.

Notably, the justices held that the appellate court "placed undue emphasis" on the fact that the person who made the comment to Bailey was a co-worker rather than her supervisor.

"The Court of Appeal placed great emphasis on this distinction, treating the status of the speaker as dispositive on this record and faulting Bailey for failing to cite any authority holding that use of a racial epithet by a coworker created a hostile work environment," Justice Evans said. "This is where we part ways with the Court of Appeal."

While the status of a speaker can certainly be a significant factor in assessing the severity of harassment, it must be considered "as part of the totality of the circumstances," not as a defining element, she said.

"A rigid distinction between supervisors and coworkers fails to take into account the full context of the workplace," it said.

Thus, the record in Bailey's case "presents triable issues of fact" on her harassment and retaliation claims, the state supreme court said.

According to her suit, Bailey started at the district attorney's office in 2001. In 2011, she was promoted to an investigative assistant working in the records room. Her suit centers on an incident in which she said she was "startled" by a mouse, and her fellow investigative assistant Saras Larkin said, "You [N-word]s is so scary."

Bailey didn't initially report the comment but eventually met with a human resources director and the office's assistant finance chief. In the meeting, Larkin denied making the comment and Bailey went on leave, she said. Bailey said she was also told not to discuss the incident with others because that would create a hostile work environment for Larkin. The human resources manager also threatened Bailey that she was "going to get it," she said.

Ultimately, human resources declined to investigate, saying the allegations were "insufficient," Bailey said.

A San Francisco Superior Court granted summary judgment to the DA's office, and California's First Appellate District upheld that finding in September 2020.

"Bailey did not in the trial court, nor has she on appeal, cited to any case holding that a single, albeit egregious, racial epithet by a coworker, without more, created a hostile work environment," Associate Justice Kathleen M. Banke of the Court of Appeal **wrote at the time**.

But in Monday's ruling, the California Supreme Court noted that in some work environments, employees rarely interact with their supervisors but may be required to work closely with co-workers. In those instances, co-workers may find that harassment by their colleagues "more quickly alters the conditions of their employment than harassment by a supervisor," it said.

"A rigid distinction between supervisors and coworkers may also ignore informal workplace relationships; not all power appears on an organizational chart," the state supreme court said.

Justice Evans also emphasized the "highly offensive and demeaning" nature of the N-word.

"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," she said.

In Bailey's case, a jury could find that the slur was extremely degrading and humiliating and that Bailey and Larkin worked closely together. It could also possibly find that Larkin "acted with a certain degree of impunity" as a result of her relationship as the human resources manager's best friend, according to the opinion.

And the city could face liability for how human resources responded to Bailey's complaint, the high court held.

"We find it appropriate to remand the matter to the Court of Appeal with directions to reconsider the issue of the city's liability for harassment in light of this opinion," Justice Evans said.

The state supreme court also considered whether a "course of conduct that effectively seeks to withdraw an employee's means of reporting and addressing racial harassment in the workplace is actionable in a claim of retaliation."

"We conclude that it may," Justice Evans said.

Here, the human resources manager's conduct "appears designed to punish Bailey for engaging in protected activity (i.e., pursuing her complaint of harassment) and threatens further punishment should she persist," Justice Evans said. "Where a supervisor or other person of authority obstructs and threatens to punish a reporting employee if she persists in bringing a complaint to higher level officials, such acts may be considered by a jury to constitute actionable retaliation."

Daniel R. Bacon, counsel for Bailey, said the high court's finding is "a pretty important decision."

"The California Supreme Court has protected employees from being harassed by coworkers with a single utterance of an epithet by ruling that such cases demand that the courts conduct a thorough analysis of the totality of the circumstances and ensure the employee's right to a jury trial," he told Law360.

Bacon said it's "heartening" that the state supreme court unanimously understands the issue. In many ways, co-worker harassment can be worse than harassment by a supervisor, Bacon said.

"Any kind of harassment is unlawful and should be investigated," he said.

Legal Aid at Work, which submitted an amicus brief on behalf of Bailey in the case, called it a "historic ruling."

"Legal Aid at Work understands that this is the first time that a court has ever held that a coworker's single use of an unambiguous racial epithet, such as the N-word, can constitute actionable racial

harassment," it said in a statement. "Courts have previously held that a supervisor's single use of the N-word may suffice, but never a coworker's single use of an epithet."

The San Francisco City Attorney's Office didn't immediately respond to a request for comment late Monday.

Bailey is represented by Daniel Ray Bacon and Robert L. Rusky.

The San Francisco District Attorney's Office was represented by Katharine Hobin Porter, Jonathan Rolnick, Boris Reznikov, Neha Gupta and Tara M. Steeley of the San Francisco City Attorney's Office.

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 Amanda Ottoway. Editing by Michael Watanabe.
