

DISCRIMINATION—RACE—CAL. SUP. CT.: COWORKER'S ONE-TIME USE OF N-WORD MAY HAVE BEEN SEVERE ENOUGH TO CREATE A HOSTILE ENVIRONMENT

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Wolters Kluwer Employment Law Daily • July 31, 2024

The record suggested the coworker acted with a certain degree of impunity due to her close relationship with the HR manager, and thus had a degree of influence over the employee's working conditions.

A coworker's one-time use of the N-word may create an actionable hostile work environment if it is sufficiently severe in light of the totality of the circumstances, the California Supreme Court ruled in reviving a Black employee's lawsuit alleging the San Francisco District Attorney's Office failed to take proper corrective action following her complaint that a coworker with whom she shared an office and duties directed the racial slur against her. Reversing an appeals court's decision affirming summary judgment on the employee's California Fair Employment and Housing Act (FEHA) claims, the state's high court also held that the HR manager's alleged obstruction of the employee's means of reporting and addressing racial harassment, followed by acts of hostility that culminated in a threat that the employee was “going to get it,” could constitute an adverse employment action for purposes of her retaliation claim (*Bailey v. San Francisco District Attorney's Office*, No S265223 (Cal. Sup. Ct. July 29, 2024)).

Coworker's racial slur. The employee worked in the records department of the DA's Office since 2001, and she and the Fijian/East Indian coworker shared an office and job duties. In January 2015, the coworker told the employee that she had seen a mouse run under her desk. After the employee jumped out of her chair, the coworker allegedly walked up and quietly said, “You [N-words] is so scary.”

HR manager's inaction. The employee became very upset and told three coworkers about the racial slur. However, she did not file a complaint since the coworker was best friends with the HR manager and had taken actions against two other Black women which caused them to be reassigned or separated. A supervisor later learned about the incident and reported it. The HR manager and an assistant chief met with the employee the next day and advised her that “management would address the issue.” However, the HR manager did not file a formal complaint with the city's Department of Human Resources (DHR) as city policy required.

Hostility and threat. On March 23, the employee specifically asked that a DHR complaint be filed. In response, the HR manager refused and admonished her for telling others about the incident, stating that she could have caused a hostile work environment for the coworker. After the meeting, the HR manager became increasingly hostile towards her, including ignoring and jeering at her and remarking that her workers' compensation claim was not “real.”

DHR later learned about the employee's complaint and interviewed her on May 22, but on July 22 advised her that her allegations were insufficient. On August 12, the HR manager allegedly pulled up alongside the employee's car in the parking lot, made a threatening gesture, and mouthed “you are going to get it.” The employee complained about the threat and the HR manager's other intimidating acts, but the DHR ultimately concluded her allegations were not sustained. She continued to complain and took a six-week medical leave due to the severe workplace stress, and the coworker was eventually reassigned to another position on another floor.

Procedural history. The employee brought this lawsuit alleging FEHA violations, the trial court granted the city's motion for summary judgment, and the appeals court affirmed. The two primary issues on appeal were whether a jury could find that the

coworker's one-time racial slur created a hostile work environment and/or that the HR manager subjected the employee to an adverse employment action.

Severity of harassment. The California Supreme Court first found that a triable issue existed as to whether the coworker's one-time use of the N-word could be deemed sufficiently severe to create a hostile work environment under the totality of the circumstances. The case involved an “unambiguous racial epithet” that was directed specifically at the employee, and a jury could find that the modifier “scary” further heightened the slur's impact. She also shared an office space and work duties with her harasser, and thus she could not distance herself from her.

Moreover, the appeals court “placed undue emphasis” on the fact that the slur was made by a coworker and not a supervisor. While the status of the speaker may be a “significant factor” in the analysis, “it must be considered not as a defining element, but as a part of the totality of the circumstances,” explained the state's high court. For instance, such a “rigid distinction” between supervisors and coworkers could discount informal workplace relationships in which a coworker may “have a unique ability to alter the conditions of others' employment without having direct managerial authority.” And in the instant case, the parties disputed whether the coworker acted with a certain degree of impunity due to her close relationship with the HR manager and consequently had a degree of influence over the employee's working conditions.

Adverse employment action. The California Supreme Court also found that the appeals court erred in concluding that the employee's retaliation claim failed since she did not suffer an adverse employment action. Rather, the HR manager's course of conduct could suffice, particularly considering that she not only failed to prepare a DHR complaint when the employee first complained as policy required, but then expressly refused her specific request to do so. This “withdrawal of an employee's right to avail themselves of the HR process typically available to other employees,” could be deemed an adverse employment action since it “is reasonably likely to impair the affected employee's job performance insofar as it leaves them unprotected from the very harms FEHA was designed to eliminate.”

The state's high court emphasized that the employee's retaliation claim was not based on the city's mere inaction in response to her harassment complaint. Rather, the alleged adverse employment action constituted the HR manager's purposeful obstruction of her complaint, which included an admonition that she might create a hostile work environment for her harasser if she persisted, as well as the HR manager's escalating threats in the parking lot in August, which could be deemed “quintessentially retaliatory.”

The case is No. S265223.

Judge: Evans, K.

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Cases: RaceDiscrimination Discrimination Retaliation StateLawClaims CaliforniaNews