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California Supreme Court:

Single Use of Racial Slur May Be Workplace Harassment

Evans Says One-Time Use of Epithet by Coworker May Be Actionable Under Fair Employment and Housing Law

By Kimber Cooley, Staff Writer

The California Supreme Court held yesterday that a one-time use of a racial slur by a coworker may be sufficiently severe, under the circumstances, to create a hostile work environment and support a workplace harassment claim under California employment law.

Actions by a human resources employee in interfering with the reporting and addressing of the harassment might amount to retaliation by the employer, the high court also held.

The dispute arose in a suit brought by Twanda Bailey, an employee of the San Francisco District Attorney's Office, alleging that a coworker with whom she shared an office said "you [N-word]s are so scary."

Bailey, who is Black, filed suit against the office as well as the City and County of San Francisco and former District Attorney George Gascón (currently serving as the district attorney of Los Angeles) alleging violations of the California Fair Employment and Housing Act ("FEHA"), codified at Government Code §12900 et seq.

Sec. 12940(j)(1) provides that it is unlawful for an employer to harass an employee "because of race." Under §12940, if the harassing conduct is sufficiently severe or pervasive to render the workplace a hostile environment, the employer may be held liable "if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action."

Then-San Francisco Superior Court Judge Harold Kahn (now retired) granted summary judgment in favor of the defendants, finding that no trier of fact could find severe or pervasive racial harassment based on the one-time use of the slur by a coworker.

Div. One of the First District Court of Appeal agreed and, in an unpublished opinion by Justice Kathleen Banke, concluded that the single use

of an epithet by a non-supervisory employee was insufficient as a matter of law to constitute actionable harassment.

Justice Kelli Evans wrote the opinion for the unanimous court reversing the judgment of the Court of Appeal and said:

"[W]e conclude that an isolated act of harassment may be actionable if it is sufficiently severe in light of the totality of the circumstances, and that a coworker's use of an unambiguous racial epithet, such as the N-word, may be found to suffice."

Racial Slur

In 2011, Bailey was promoted to an investigative assistant position and was assigned to share an office with another assistant, Saras Larkin. On Jan. 22, 2015, Larkin made the derogatory statement after Bailey jumped out of her chair upon being told that a mouse ran under her desk.

Bailey did not immediately report the incident to human resources because she feared retaliation due to the close friendship of Larkin with Evette Taylor-Monachino, the office's personnel officer.

Alexandra Lopes, Bailey's supervisor, reported the incident the following day after overhearing Bailey telling another employee about the encounter. Taylor-Monachino declined to file a formal complaint, but Larkin was informed that the use of the slur was unacceptable and was asked to sign an acknowledgment of the office's anti-harassment policy.

Bailey alleges that Taylor-Monachino treated her differently after the incident was reported, staring rudely and jeering at her.

After an investigation by the human resources department, Bailey was informed that her allegations were "not-sustained" but that Taylor-Monachino would no longer be assigned to handle employee complaints.

On Dec. 30, 2015, Bailey filed a complaint against the defendants (collectively referred to in the opinion as "the City"). Kahn granted the defendants' motion for summary judgment as to both the harassment and retaliation claims under FEHA and dismissed the complaint with prejudice on Oct. 20, 2017.

Severity or Pervasiveness

As to the severity or pervasiveness of the conduct, Evans explained that courts look to the totality of the circumstances surrounding the conduct, including the frequency of the harassment, its severity, and whether it unreasonably interferes with an employee's work performance.

Evans remarked that "[t]urning to the conduct at issue in this case—the one-time use of a racial slur—we begin in a place of agreement with the Court of Appeal: 'a single racial epithet can be so offensive it gives rise to a triable

issue of actionable harassment' " and said "[w]e 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."

She disagreed with the First District's faulting Bailey for failing to cite authority holding that the use of a slur by a coworker created a hostile work environment and said:

"Though acknowledging that the isolated use of an unambiguous racial epithet may give rise to a triable issue of actionable harassment depending on the totality of the circumstances, the Court of Appeal went on to draw a distinction between the use of such language by a supervisor and the use of such language by a coworker….Harassment claims are inherently fact specific, however, and the sufficiency of allegations involving a supervisor does not itself establish the insufficiency of allegations involving a coworker."

The justice declared that "[a]pplying these standards to the facts of this case, we conclude there is a triable issue of fact whether Larkin's one time use of the N-word was, under the totality of the circumstances, sufficiently severe so as to create a hostile work environment."

Imputable to City

Evans said "[b]ecause Bailey raises a genuine issue of material fact regarding the severity of the harassment, we next consider whether that conduct is imputable to the City" and "FEHA establishes a negligence standard for determining whether an employer is liable for harassment by a nonsupervisory employee."

She reasoned:

"Taylor-Monachino was the person charged with receiving complaints of harassment in the workplace…[T]here is evidence to suggest that Taylor Monachino sought to convey that complaints of harassment would not be taken seriously and actively undermined the remedial efforts of others from her position of authority."

The Court of Appeal declined to consider Taylor-Monachino's conduct as part of the defendants' response to Bailey's allegations and instead looked only to the fact that Larkin was reprimanded and asked to sign an acknowledgment of the office's anti-harassment policies.

Taking issue with its failure to consider evidence relating to Taylor-Monachino's conduct in assessing the city's liability, Evans said:

"The Court of Appeal…purported to 'agree with the trial court' that there was no triable issue regarding the City's liability…even though the matter of immediate and appropriate corrective action was barely briefed in the City's motion for summary judgment and the trial court did not address it. In view

of the foregoing, 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."

Retaliation Claim

Sec. 12940(h) provides that it is unlawful "[f]or any employer…to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint."

Evans commented:

"It is undisputed Bailey engaged in protected activity when she reported Larkin's use of a racial slur. This was activity for which she could not be subject to retaliation. The City moved for and obtained summary judgment, however, on the ground that Bailey suffered no adverse employment action….Bailey contends this holding ignores our precedent regarding the breadth of conduct that may constitute an actionable adverse employment action, as well as the mandate that such conduct be considered collectively and in context. We agree."

She said that Banke's opinion gave only a "rather scant discussion" of Taylor-Monachino's conduct which "reveals a failure to appreciate the nature of this conduct by this particular actor in the context of this workplace."

The jurist concluded:

"Considering Bailey's allegations collectively and in view of the unique circumstances of the affected employee and the workplace context of her claims, we conclude that a reasonable trier of fact could find Taylor-Monachino's acts constituted a course of conduct that rises to the level of an adverse employment action."

She added:

"To be clear, our opinion today does not hold that an employer's mere inaction (e.g., the failure to investigate a claim of racial harassment or take corrective action)…constitutes an act of retaliation….The instant claim of retaliation, however, is not based on mere inaction. It is based on an HR manager's purposeful obstruction of Bailey's complaint….And it is based on Taylor-Monachino's escalating threats in August, when she mouthed the words, 'you are going to get it.' Though ultimately it is for a jury to decide whether Taylor-Monachino's conduct rises to the level of an adverse employment action in this case, such conduct could be understood as quintessentially retaliatory."

The case is *Bailey v. San Francisco District Attorney's Office*, 2024 S.O.S. 2545.