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Race Discrimination

Single Incident Racial Harassment Case Argued to Second Circuit by EEOC, Others

A white supervisor's one-time use of an egregious racial epithet to address a black building security employee is enough to establish a hostile work environment under federal employment law. At least that was the argument made to the Second Circuit by EEOC attorney Gail Coleman (*Daniel v. T&M Prot. Res., LLC*, 2d Cir., No. 15-560-cv, *oral argument* 4/18/17).

There's ''no more odious word'' in the English language than the ''N'' word, Coleman told the court. That a single incident or comment can give rise to employer liability if severe enough has long been the view of the federal anti-bias watchdog, the Equal Employment Opportunity Commission's attorney said April 18.

The case involves an open issue of law in the U.S. Court of Appeals for the Second Circuit—which includes New York, Connecticut and Vermont—as well as other jurisdictions. Otis Daniel claims supervisor John Melidones called him a ''fucking n*****'' over the phone while Daniel was working for international security and intelligence services provider T&M Protection Resources LLC.

The word ''is uniquely offensive'' as it ''dredges up the entire history of racial discrimination in our country,'' said Coleman, an attorney in the EEOC's general counsel's office in Washington. The EEOC supported Daniel as an amicus.

Melidones denies ever making the remark, T&M's lawyer Leonard Weintraub told the court. Moreover, according to court records the worker reported the alleged comment only in an anonymous, undetailed complaint, and there was no witness or other testimony corroborating that the remark was made, Weintraub said. He's with Paduano & Weintraub LLP in New York.

But there is other evidence that Melidones harassed Daniel based on his race, sexual orientation and national origin, the EEOC told the Second Circuit. Daniel is gay and from St. Vincent and the Grenadines. That should swing the overall outcome in Daniel's favor even if a single comment isn't enough, the EEOC argued.

'He Said, He Said' Scenario? ''I think it will be very hard for the Second Circuit to come up with the bright-line rule'' the EEOC seeks on a single use of the ''N'' word being sufficient for a racial harassment claim, management-side attorney Ellen R. Storch said. ''What's interesting about single incident cases is that they're so incredibly focused on context.'' Here the company did a good job, particularly in its brief, of setting up factors the court can rely on to decide that Daniel's case isn't the one it wants to use to set any blanket rules, said Storch, who isn't affiliated with the parties in the case.

The company ''reframed the issue very cleverly'' by citing the lack of evidence corroborating the alleged use of the ''N'' word, Storch, a partner in Woodbury, N.Y.-based Kaufman Dolowich & Voluck LLP, said. It also cited evidence that the comment was made over the phone and thus could be perceived as less threatening or intimidating than a remark made in person, and noted that the plaintiff continued to work for T&M after the remark allegedly was made, potentially undercutting the notion that it interfered with his ability to work. Those are factors in the traditional hostile work environment analysis, she said.

''I also thought it was particularly interesting that the plaintiff made an internal complaint'' with the company following his discharge, but not about the alleged ''N'' word incident. He also didn't mention Melidones' alleged epithet in the discrimination charge he filed with New York state, she added. Storch was referring to information taken in part from the company's brief.

What the court may be looking at is a ''he said, he said'' situation that comes down to a question of credibility, Storch said. It may be hard for the court to believe a jury could find the alleged comment was actually made if it wasn't referenced in Daniel's bias charge, made the subject of an internal investigation or heard by anyone else, Storch said. A failure to complain or report the comment also could go to the question of whether the plaintiff subjectively believed he experienced unlawful harassment, which is also a factor in the hostile environment analysis, she said.

Does Precedent Support Letting Jury Decide? Indeed, the court during oral argument questioned whether Daniel reported the alleged incident to T&M and thus whether the employer had a chance to remedy the alleged harassment. From an employer's point of view, it asked the EEOC, what's an employer to do to guard against the existence of a hostile work environment and liability for damages if a single incident like this goes unreported?

Because the alleged harasser was a supervisor as opposed to a co-worker, that's enough under Title VII of the 1964 Civil Rights Act, Coleman responded.

Who the harasser is in relation to the plaintiff is an important factor in determining an employer's potential liability under U.S. Supreme Court precedent, plaintiffs'-side attorney Mike Popsis told Bloomberg BNA. Moreover, there is Supreme Court and Second Circuit precedent establishing that ''there isn't any sort of quantity standard'' or magic number of incidents re-

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quired to establish hostile environment harassment under Title VII.

The standard is ''severe or pervasive'' harassment, and the employee doesn't need to prove both, Popsis of Popsis Law PLLC in New York said. The EEOC makes the same point in its amicus brief.

Single comments such as the one alleged here can be as wounding as a course of conduct, Popsis said. He thinks the court will decide that a single use of the ''N'' word ''can be,'' but isn't always, sufficient to show hostile environment harassment.

The Second Circuit recently has seemed ''more willing to accept arguments that are favorable to'' worker rights, he said. ''I hope the court issues a ruling that permits single incident cases to reach a jury.''

If so, that would be consistent with what lawyers in other parts of the country previously told Bloomberg BNA regarding an emerging recognition of single incident harassment claims.

Reminder of Need for Employment Policy, Training Regardless of the outcome, Storch said the case should serve as a reminder of the benefit for employers and employees of having good anti-harassment policies and training programs in place.

Daniel's case may hinge on whether he followed T&M's reporting procedures, or whether he didn't do so because he feared for his job, as he told the Second Circuit during oral argument, she said. So it's important for employers to review their policies to ensure they contain multiple avenues for reporting harassment, so a worker will have the chance to avoid complaining in a way that he fears might spur retaliation, she said. It's also essential to train supervisors and other decision makers on the need to avoid potential retaliation against a worker who claims he's been unlawfully harassed, Storch said.

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