15-560-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OTIS A. DANIEL,
Plaintiff-Appellant,

v.

T&M PROTECTION RESOURCES, LLC,
Defendant-Appellee.

On Appeal from the U.S. District Court
for the Southern District of New York
Hon. Paul A. Engelmayer, Judge

BRIEF OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF DANIEL, IN FAVOR OF RECONSIDERATION OF DISMISSAL, AND IN FAVOR OF REVERSAL OF SUMMARY JUDGMENT

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Statement of Interest

The Equal Employment Opportunity Commission ("EEOC") is charged by Congress with interpreting, administering, and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The district court agreed that Daniel was subjected to "'crude and contemptible' conduct" but held that his mistreatment was not severe or pervasive enough to constitute a hostile work environment under Title VII. (R.106, Slip Op. at 24-25) The EEOC believes that the district court imposed too strict a standard for demonstrating severe or pervasive harassment. This Court dismissed his *pro se* appeal without the benefit of briefing or argument. Because the EEOC has a strong interest in seeing that courts interpret Title VII correctly, it offers its views to the Court.

Statement of the Issues

1. Is a supervisor's statement "you fucking nigger" to a subordinate sufficiently severe, by itself, to create a hostile work environment within the meaning of Title VII?

2. Could a reasonable jury find that Daniel endured severe or pervasive harassment on the basis of his race, perceived national origin, and perceived sexual orientation where his immediate supervisor called him "you fucking nigger," likened him to a gorilla, frequently told him to "go back to England," and called him "homo" two or three times a week?

Statement of the Case

A. Statement of Facts

Otis Daniel is a black man from St. Vincent and the Grenadines, a small island in the Caribbean. (R.65-1, Daniel Dep. at 10, 89) He is gay but did not tell his employer or coworkers this fact. (*Id.* at 247-48) Daniel applied for a position as a fire safety director with T&M, a global security and investigations firm. In February 2011, T&M sent Daniel to interview at a commercial office building that was one of T&M's clients. Daniel had a joint interview with John Melidones, the building's security director, and Bill Wood, the assistant property manager. One week after the interview, Daniel was offered the job. (*Id.* at 46-47, 49) His immediate supervisor was Melidones. (*Id.* at 166)

After Daniel's first week on the job, Melidones told him that property managers in the area prefer to hire white security personnel and that the only reason Daniel was hired was that Wood liked him. Melidones also said that this type of job is being done nowadays by Indians, Hispanics, and blacks, and that Daniel got the job because there was no other option. (*Id.* at 81-83) Soon after this, Melidones told Daniel that he thought Daniel was being paid too much. (*Id.* at 103) Melidones made comments about Daniel being stupid and told him he was an idiot. (*Id.* at 155)

Shortly after Daniel began his job, Melidones likened him to a gorilla. "Smile," Melidones said, "you look like a gorilla, why the angry face?" (*Id.* at 90)

Melidones insisted that Daniel came from England, which Daniel found offensive. (*Id.* at 95-96) Melidones continued to insist upon this even after Daniel showed him his birth certificate. (*Id.*) "Every single time" that Melidones spoke to Daniel, he did so with an imitated English accent. (*Id.* at 91) "Can you speak to me with your normal tone of voice?" Daniel asked. (*Id.* at 95) Melidones randomly asked Daniel to define large words. (*Id.* at 92) Melidones also sang Calypso. (*Id.* at 132) Melidones asked Daniel why he came to the United States and did not stay in his own country. (*Id.* at 108-09) Daniel testified that "many times," Melidones told him, "Go back to England." (*Id.*)

From February 2011 through September 2011, Melidones told Daniel two or three times a week, almost every week, "You are not black." (*Id.* at 89) Melidones explained to Daniel, "You are not black because you don't wear your pants down your waist, you don't swagger or you don't 'what up.'" (*Id.* at 90) In the presence of coworkers who were black or Indian, Melidones asked Daniel, "What do you think, you are better than these people?" (*Id.*)

Joe Greisch, the property manager, said something about Daniel's clothes one day when he passed Daniel in the lobby. Daniel interpreted this as a reference to his perceived sexual orientation. He was so uncomfortable about the comment

that from then on, he entered the building through the loading dock and went directly to the locker room to change into his uniform. (*Id.* at 74)

Daniel's coworkers openly speculated about his sexual orientation. When the newspaper published an article about a "gay hotel" that had just opened in Times Square, one coworker asked Daniel, "Are you going to go?" (*Id.* at 249) An engineer told Daniel, "I heard you are gay." (*Id.* at 250)

Melidones "repeatedly" went into the locker room and watched Daniel nap (which Daniel did during his lunch break) or change his clothes. (*Id.* at 105) One time, as he watched Daniel change, he said, "I didn't hire you to be beautiful. I want a supervisor, not a God." (*Id.* at 233-34) Daniel testified that "many times," Melidones told him, "Man up, be a man." (*Id.* at 68)

In June or July 2011, Melidones came up behind Daniel while he was standing at his work podium, brushed up against Daniel's buttocks with his genitalia, and asked Daniel, "Are you gay?" (*Id.* at 230) Subsequently, Melidones came up behind him two or three times a week, leaned into him, and said "homo" into Daniel's ear. (*Id.* at 231-32) Two or three times a week, he also said to Daniel's coworker Manny Padermo, in Daniel's presence, "Manny the homo, Manny the homo." (*Id.*)

In September 2011, Daniel switched from the day shift to the night shift to avoid Melidones. (*Id.* at 67, 125) Although the new shift eliminated many of his

physical encounters with Melidones, Daniel was required to work "many" double-shifts and had to work with Melidones at those times. (*Id.* at 67-68, 72-73) Also, Melidones sometimes stayed late, went into the locker room while Daniel was changing, and made "inappropriate remarks." (*Id.* at 68, 70-72, 122)

In December 2011, after investigating the theft of a tenant's computer, Melidones told Daniel, "I have a picture of a black male with a bald head. Basically, is this you?" (*Id.* at 107)

In March 2012, Melidones called while Daniel was working and said, "I am at the Broadway show Mary Poppins. I can see you as Mary Poppins. You will make a good Mary Poppins." (*Id.* at 234)

During the Presidential campaign of 2012, Melidones asked Daniel, "Are you going to vote for your man, Obama?" Daniel said that he was a registered Republican, and Melidones replied, "I guess you are alright after all." (*Id.* at 109-10)

In May 2012, Melidones passed Daniel at the podium and slapped him hard on his right shoulder. As he had "many times" in the past, he said to Daniel, "Man up, be a man." (*Id.* at 68, 133)

Later that month, Melidones told Daniel to contact a tenant about a planned employee termination. Immediately after Daniel did so, Melidones screamed at him, "Who told you to call?" When Daniel tried to respond, Melidones told him,

"Shut the fuck up, you fucking idiot. You fucking nigger." (*Id.* at 112-15) Daniel could not face Melidones after this and took the next day off, falsely claiming to be sick. (*Id.* at 117) T&M fired Daniel one week later. (R.67-2, Separation Notice)

B. District Court Decision

The district court granted summary judgment, holding that Daniel had not raised a genuine issue of material fact over whether he was subjected to "severe or pervasive" harassment. "As a threshold matter," the court said, "some of the conduct Daniel complains of does not appear to be related to his race, perceived national origin, or sex.[1] Such incidents 'must be removed from consideration.'" (R.106, Slip Op. at 17 (citing *Alfano v. Costello*, 294 F.3d 365, 377 (2d Cir. 2002)) Included in this category, the court said, are Daniel's allegations that Melidones repeatedly watched him nap and change clothes in the locker room, that he asked Daniel whether he had stolen a computer, that he asked Daniel to define large words, that he called Daniel stupid, and that Greish "vaguely comment[ed] on his clothing." (*Id.* at 18-19).

The remaining incidents, the court held, are insufficient to constitute "severe or pervasive" harassment. "[A]s recounted by Daniel," the court explained, "the incidents motivated by his protected characteristics occurred sporadically and relatively infrequently. . . . The 'episodic' incidents Daniel endured were not

[1] The district court construed Daniel's claim of harassment based on his perceived sexual orientation as a claim of sexual harassment. (R.106, Slip Op. at 16 n.1)

'sufficiently continuous and concerted in order to be deemed pervasive.'" (*Id.* at 18-19 (quoting *Alfano*, 294 F.3d at 374)) The court also found it "relevant that the most severe incidents were isolated, whereas Melidones's more frequent behavior toward Daniel was comparatively benign." (*Id.* at 19) Melidones's one-time use of the word "nigger" while yelling at Daniel, the court held, "although reprehensible, cannot, by itself, sustain a hostile work environment claim." (*Id.* at 19-20) The court concluded, "Considering the evidence favoring Daniel cumulatively, 'the allegations against [T&M] involve episodes of name-calling, inappropriate behavior by a supervisor, and other perceived slights, which, however regrettable, do not constitute a hostile work environment.'" (*Id.* at 20 (citation omitted))

The court noted that summary judgment "might be inappropriate if Melidones had physically threatened Daniel or humiliated him in front of his coworkers," but observed that Daniel did not make such allegations. (*Id.*) Moreover, the court said, the evidence provided only limited support for a finding that Melidones's conduct interfered with Daniel's work performance. (*Id.* at 21)

Finally, the court compared Daniel's allegations to the facts of previous cases. The comparison, the court said, showed that Daniel was "mistreated – based in part on his race, perceived national origin, and perceived sexual orientation. . . . However, measured against the standards set by the case law, Daniel's

mistreatment does not rise to the level of 'severe or pervasive' harassment so as to create a 'hostile or abusive' work environment." *(Id.* at 25)

C. Second Circuit Dismissal

Daniel, who appeared *pro se* in the district court, filed a timely notice of appeal and moved for leave to proceed *in forma pauperis*. (R.112, Notice of Appeal & Motion) This Court denied the motion and dismissed the appeal "because it 'lacks an arguable basis in either law or in fact.'" (2d Cir. R. 35 (citation omitted))

Summary of Argument

A reasonable jury could find that Daniel experienced a hostile work environment within the meaning of Title VII on the basis of his race, perceived national origin, and perceived sexual orientation. His supervisor's statement "you fucking nigger" is, by itself, sufficient to defeat summary judgment. Combined with the other evidence in this case, Daniel has presented more than enough evidence to reach a jury.

The district court erred by minimizing the significance of the term "nigger." The court also erred by downplaying the remainder of the evidence in this case. The court dismissed some of Daniel's allegations as facially neutral incidents without acknowledging that such incidents may be part of a discriminatory work environment if the same individual engages in multiple acts of harassment, some

overtly discriminatory and some not. The court also failed to understand Daniel's testimony about the frequency of Melidones's harassment and did not recognize that even low-level harassment can be "pervasive" within the meaning of Title VII.

Argument

This Court should reinstate Daniel's appeal and reverse summary judgment because the case has legal and factual merit.

A. A supervisor's statement "you fucking nigger" to a subordinate is, by itself, sufficiently severe to constitute an actionable hostile work environment within the meaning of Title VII.

Melidones's use of the phrase "you fucking nigger" to Daniel is, by itself, sufficiently severe to constitute an actionable hostile work environment within the meaning of Title VII. *See* EEOC Compl. Man. § 15-VII(A)(2), 2006 WL 4673430 (June 2006) ("Examples of the types of single incidents that can create a hostile work environment based on race include . . . an unambiguous racial epithet such as the 'N-word' . . . ."). As the Fourth Circuit recently held in an en banc opinion regarding a supervisor's two-time use of the term "porch monkey," "This is the type of case contemplated in *Faragher* [*v. City of Boca Raton*, 524 U.S. 775, 788 (1998)] where the harassment, though perhaps 'isolated,' can properly be deemed to be 'extremely serious.'" *Boyer-Liberto v. Fontainebleau Corp.*, ___ F.3d ___, 2015 WL 2116849, at *13 (4th Cir. May 7, 2015) (en banc).

The word "nigger," perhaps more than any other, "evok[es] a history of racial violence, brutality, and subordination. This word is 'perhaps the most

offensive and inflammatory racial slur in English . . . a word expressive of racial hatred and bigotry.'" *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004) (quoting *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001)).

> One scholar explains the import of the word "nigger" as follows:
>
> > Nigger was the word kissing the air as families were auctioned throughout the American South. It hovered below black lynched bodies and accompanied civilian and police brutality against blacks throughout the last century. It was the word used by Sheriff Clarence Strider each day during the trial against two white men accused [of] (acquitted, but later confessing to) brutally slaying fourteen year old Emmit Till. Neither man ever served time for the murder. Sheriff Strider, the town's law enforcement official, greeted black court reporters and Till's mother each day with, "hello niggers."

Michele Goodwin, *Nigger and the Construction of Citizenship*, 76 Temp. L. Rev. 129, 193 (Summer 2003); *see also* David Pilgrim & Phillip Middleton, *Nigger and Caricature*, Ferris State Univ., Jim Crow Museum of Racist Memorabilia (Sept. 2001, rev. 2012), *available at* http://www.ferris.edu/jimcrow/caricature/ ("Nigger is the ultimate expression of white racism and white superiority . . . ."); Okianer Christian Dark, *Racial Insults: "Keep Thy Tongue From Evil,"* 24 Suffolk L. Rev. 559, 566 (Fall 1990) ("'Nigger' dredges up the entire history of America's legal dehumanization of blacks in slavery."); Richard Delgado, *What if Brown v. Board of Education Was a Hate-Speech Case?* 1 Stan. J. C.R. & C.L. 271, 286, 286 n.94 (Apr. 2005) (book review) ("[T]he English language contains no correlate for nigger in the lexicon of terms for whites." Terms such as honkey, cracker, and

white trash "do communicate that the black dislikes the white. But, by themselves they do not carry an implied threat nor call up and evoke long histories of oppression.").

This Court already recognizes that a single utterance of the word "nigger" may be enough to create a hostile work environment. "'Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates.'" *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 24 (2d Cir. 2014) (citation omitted); *see also Albert-Roberts v. GGG Constr., LLC*, 542 Fed. Appx. 62, 64 (2d Cir. 2013) ("There may well exist circumstances where a single use of the word 'nigger' would rise to the level of a hostile work environment, but on the facts present here [where coworker, not supervisor, used the term to plaintiff's husband, not to plaintiff], this is not such a case.").

Other circuits agree. *See Boyer-Liberto*, 2015 WL 2116849, at *12-13 (jury could find that supervisor's two-time use of the term "porch monkey" is severe enough to create a hostile work environment because the term "is about as odious as the use of the word 'nigger'"); *Reed v. Procter & Gamble Mfg. Co.*, 556 Fed. Appx. 421, 434 n.2 (6th Cir. 2014) ("We do not exclude the possibility that only one or two incidents of race-based harassment may be so severe as to constitute a

hostile work environment."); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013) (single incident of supervisor yelling at plaintiff to "get out of my office nigger" might, on its own, be enough to create a hostile work environment); *Ezell v. Potter*, 400 F.3d 1041, 1048 (7th Cir. 2005) ("[I]n the case of racial and ethnic slurs, some words are so outrageous that a single incident might qualify for a hostile environment claim").

This Court should make clear that the term "nigger" "ha[s] no place in the employment setting." *Lenoir v. Roll Coater, Inc.*, 13 F.3d 1130, 1133 (7th Cir. 1994). This is especially true when a supervisor directs the slur at a subordinate. *See Faragher*, 524 U.S. at 803 (recognizing that, unlike with coworker harassment, employees are not free to walk away when their supervisor is the harasser); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) ("[A] supervisor's use of the term [nigger] impacts the work environment far more severely than use by co-equals.").

B. A reasonable jury could find that Daniel endured "severe or pervasive" harassment not only based on his supervisor's statement "you fucking nigger" but also based on his supervisor's other conduct, including likening him to a gorilla.

Daniel has raised a genuine issue of material fact regarding the existence of "severe or pervasive" harassment on the basis of his race, perceived national origin, and perceived sexual orientation. While a jury could find a hostile work

environment based solely on Melidones's use of the term "you fucking nigger," *see supra*, a jury could also consider additional evidence.

Shortly after Daniel began his job, Melidones likened him to a gorilla. (R.65-1, Daniel Dep. at 90) As the Fourth Circuit has recognized, comparing a person to a monkey is "odious." *Boyer-Liberto*, 2015 WL 2116849, at *12. "To suggest that a human being's physical appearance is essentially a caricature of a jungle beast goes far beyond the merely unflattering; it is degrading and humiliating in the extreme." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 187 (4th Cir. 2001); *see also* EEOC Compl. Man. 15-VII(A)(2) (June 2006), *available at* 2006 WL 4673430 ("racial comparison to an animal" is an extremely serious incident of harassment and its one-time occurrence can create a hostile work environment).

Contrary to the district court's understanding that Melidones harassed Daniel only "sporadically and relatively infrequently" (R.106, Slip Op. at 18), Daniel testified that from February 2011 through September 2011, Melidones told him two or three times a week, almost every week, "You are not black" (*id.* at 89), and that Melidones explained this comment by saying, "You are not black because you don't wear your pants down your waist, you don't swagger, you don't 'what up.'" (*Id.* at 90) Additionally, Daniel testified that Melidones "repeatedly" went into the locker room and watched Daniel change or nap (*id.* at 105); that "many times" he

told Daniel to "man up, be a man" (*id.* at 68); that he came up behind Daniel two or three times a week, leaned into him, said "homo" into Daniel's ear (*id.* at 231-32); and that two or three times a week he taunted a coworker in Daniel's presence by saying "Manny the homo, Manny the homo" (*id.*). Daniel also testified that "every single time" Melidones spoke to him, he did so with an imitated English accent (R.65-1, Daniel Dep. at 91); that Melidones randomly asked him to define large words (*id.* at 92); and that "many times" he told Daniel to "go back to England (*id.* at 108-09)."

The district court refused to consider certain incidents of harassment that it characterized as facially neutral conduct. (R.106, Slip Op. at 17) However, a reasonable jury could infer that Melidones's facially neutral conduct was infused with discrimination and was motivated by his animosity toward Daniel based on protected characteristics. Such an inference is permissible when "'the same individual' engaged in 'multiple acts of harassment, some overtly [based on a protected characteristic] and some not.'" *See Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 547-48 (2d Cir. 2010) (citation omitted). Thus, contrary to the district court's holding, Daniel's allegations that Melidones repeatedly watched him nap and change clothes in the locker room (R.65-1, Daniel Dep. at 105), that he asked Daniel whether he had stolen a computer (*id.* at 107), that he randomly asked

Daniel to define large words (*id.* at 92), and that he called Daniel stupid (*id.* at 155) are all part of the hostile environment calculus.

Melidones's harassment on the basis of one protected characteristic exacerbated the effect of his harassment on the basis of other protected characteristics. *See Feingold v. N.Y.*, 366 F.3d 138, 151 (2d Cir. 2004) ("While [plaintiff] has not alleged sufficient facts to make out a hostile work environment claim based solely on race, his allegations of racial animosity can nevertheless be considered by a trier-of-fact when evaluating [his] religion-based claim."); *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 572 (2d Cir. 2000) ("A jury could find that [the harasser's] racial harassment exacerbated the effect of his sexually threatening behavior and vice versa."), *overruled in part on other grounds*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

Conclusion

Taken as a whole, the evidence in this case supports a finding of severe or pervasive harassment on the basis of race, perceived sexual orientation, and/or perceived national origin. A reasonable jury could find that Daniel endured a hostile work environment within the meaning of Title VII. The district court erred by granting summary judgment and this Court erred by dismissing the appeal without benefit of briefing or argument.

For the foregoing reasons, the EEOC respectfully asks this Court to reinstate Daniel's appeal and to reverse the award of summary judgment.

Respectfully submitted,

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Certificate of Compliance

I certify that this brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,585 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14 point Times New Roman.

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Certificate of Service

I certify that I filed six paper copies of the foregoing *amicus* brief with the Court by first-class mail, postage pre-paid, on the 21st day of May, 2015. I also certify that I submitted this *amicus* brief in PDF format on this 27th day of May, 2015, through the Court's Electronic Case Files (ECF) system

I certify that I served two paper copies of the foregoing *amicus* brief on the 21st day of May, 2015, by first-class mail, postage pre-paid, to the following:

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