

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION 'SUMMARY ORDER'). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

1 At a stated term of the United States Court of Appeals for
2 the Second Circuit, held at the Thurgood Marshall United States
3 Courthouse, 40 Foley Square, in the City of New York, on the
4 28th day of April, two thousand seventeen.

5
6 PRESENT: JOHN M. WALKER, JR.,
7 DENNIS JACOBS,
8 BARRINGTON D. PARKER,
9 Circuit Judges.

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11 - - - - -X
12
13 MARK JOHNSTONE,
14 Plaintiff-Appellant,

15
16 -v.-

16-2225

17
18 VILLAGE OF MONTICELLO, GORDON JENKINS,
19 individually and in his official
20 capacity as Mayor of Monticello,
21 Defendants-Appellees,

22
23 THEODORE (TC) HUTCHINS,
24 Defendant.

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26 - - - - -X
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1 **FOR PLAINTIFF-APPELLANT:** Stephen Bergstein; Bergstein &
2 Ullrich, LLP, Chester, NY.

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4 **FOR APPELLEES-DEFENDANTS:** Ralph L. Puglielle, Jr., Stephen J.
5 Gaba; Drake Loeb PLLC, New Windsor,
6 NY.

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9 Appeal from the judgment of the United States District Court
10 for the Southern District of New York (Smith, M.J.).

11
12 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND**
13 **DECREED** that the judgment of the district court be **AFFIRMED**.

14
15 Mark Johnstone appeals from the judgment of the district
16 court (Smith, M.J.) dismissing with prejudice his second amended
17 complaint under Rule 12(c) of the Federal Rules of Civil
18 Procedure. Pursuant to 28 U.S.C. § 636(c), the parties
19 consented to conduct all proceedings before a magistrate judge.
20 We assume the parties' familiarity with the underlying facts,
21 the procedural history, and the issues presented for review.

22 Johnstone, who is white, has been an officer for the Village
23 of Monticello Police Department since 1989 and a lieutenant since
24 2010. On November 16, 2013, he arrested Gordon Jenkins-- "a dark
25 skinned natural person," J.A. 14 at ¶ 2--for driving while
26 intoxicated. Johnstone alleges that Jenkins, while being
27 processed at the Monticello Police Station, called Johnstone
28 (and other white officers) a "racist," a "cracker," a "white
29 mother fucker," a "member of the KKK," and a "Nazi," and called
30 an African American officer a "sellout," an "Uncle Tom," and
31 a "token." Jenkins was, at that time, the mayor of Monticello
32 (he was removed from office on April 2, 2015 by the Appellate
33 Division, Third Department). Johnstone thereafter brought this
34 civil rights action against Jenkins and the Village of
35 Monticello; he argues that Jenkins's racial comments created
36 a hostile work environment cognizable under Title VII of the
37 Civil Rights Act of 1964 and under 42 U.S.C. § 1983 as a violation
38 of the Equal Protection Clause. The district court dismissed
39 those claims and granted judgment on the pleadings to the
40 defendants.

1 We review de novo the district court's dismissal on the
2 pleadings pursuant to Rule 12(c). L-7 Designs, Inc. v. Old Navy,
3 LLC, 647 F.3d 419, 429 (2d Cir. 2011). We accept the factual
4 allegations in the complaint as true and draw all reasonable
5 inferences in plaintiff's favor. Id.

6 Title VII prohibits, among other things, discrimination
7 "against any individual with respect to . . . terms, conditions,
8 or privileges of employment, because of such individual's race."
9 42 U.S.C. § 2000e-2(a)(1). "[R]equiring people to work in a
10 discriminatorily hostile or abusive environment" violates Title
11 VII insofar as it effectively alters the "terms" or "conditions"
12 of employment on account of an employee's race. Harris v.
13 Forklift Sys., Inc., 510 U.S. 17, 21 (1993). Public employees,
14 whose employers act under color of state law, can also bring
15 such claims under § 1983 as violations of Equal Protection, and
16 the same standard applies. Feingold v. New York, 366 F.3d 138,
17 159(2d Cir. 2004).

18 "A hostile work environment claim requires a showing
19 [1] that the harassment was sufficiently severe or pervasive
20 to alter the conditions of the victim's employment and create
21 an abusive working environment, and [2] that a specific basis
22 exists for imputing the objectionable conduct to the employer."
23 Alfano v. Costello, 294 F.3d 365, 373 (2d Cir. 2002) (citation
24 and quotation marks omitted). Isolated incidents generally "do
25 not meet the threshold of severity or pervasiveness," id. at
26 374, but a single act will suffice if it is so severe that it
27 "work[s] a transformation of the plaintiff's workplace," id.
28 "To decide whether the threshold has been reached, courts examine
29 the case-specific circumstances in their totality and evaluate
30 the severity, frequency, and degree of the abuse." Id.

31 Johnstone fails to plead facts sufficient to establish a
32 hostile work environment claim. Since one consideration is the
33 frequency of the alleged abuse, his reliance on a single incident
34 over the course of a nearly 30-year career weighs heavily against
35 him, although that alone is not dispositive. More significant
36 is that an abusive tirade by a person arrested for driving under
37 the influence is not sufficient "to alter the conditions," id.
38 at 373, of Johnstone's employment. The Supreme Court has
39 cautioned that the Title VII analysis

1 requires careful consideration of the social context
2 in which particular behavior occurs and is experienced
3 by its target. A professional football player's
4 working environment is not severely or pervasively
5 abusive, for example, if the coach smacks him on the
6 buttocks as he heads onto the field--even if the same
7 behavior would reasonably be experienced as abusive
8 by the coach's secretary (male or female) back at the
9 office.

10 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81
11 (1998). Jenkins's alleged comments were severe, but they were
12 not made in the context of an employer addressing an employee
13 in the workplace; they were made by an apparently intoxicated
14 citizen who was belligerent because he was being taken into
15 custody and processed for violating the law. Being subjected
16 to an intoxicated and verbally abusive perpetrator does not alter
17 the conditions of a police officer's employment or create an
18 actionably hostile work environment, even if the person arrested
19 happens to be the mayor.

20 Accordingly, and finding no merit in Johnstone's other
21 arguments, we hereby **AFFIRM** the judgment of the district court.

22 FOR THE COURT:
23 CATHERINE O'HAGAN WOLFE, CLERK