A HOSTILE RACIAL ENVIRONMENT: HOW HOSTILE DOES IT HAVE TO BE?

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ABSTRACT
Hostile racial environment is an important issue in the workplace. In fact, cases filed with the EEOC now outnumber sexual harassment charges. Few studies have examined the courts' interpretation of the harassment guidelines based on the rules set forth by the Supreme Court in 1998. This article reviews over 200 cases and provides guiding principles and recommendations for practitioners.

INTRODUCTION

Harassment has been recognized as a violation of the Civil Rights Act under Title VII since the late 1970's (Twomey, 2007). In 1980, the Equal Employment Opportunity Commission (EEOC) propagated guidelines regulating sexual harassment in the workplace (29CFR1604.11). The courts generally utilize these guidelines when evaluating other types of harassment such as racial harassment (Ford v. Minteq, 2009; Jordan v. City of Cleveland, 2006).

Interestingly, while sexual harassment receives the overwhelming amount of attention from a media and scholarly perspective (Bennett-Alexander, 2007; Twomey, 2007), race-based charges actually comprise 36 % of all Civil Rights violations as compared to 30% for sex based cases (EEOC, 2009). Moreover, in 2009, racial harassment complaints with the EEOC totaled 50% of all harassment charges versus 41% for sexual harassment (EEOC, 2009). Over the last 11 years, racial harassment cases have risen at about a 20% annual rate versus a 20 percent decline over the same period for sexual harassment litigation (EEOC, 2009).

Correspondingly, there has been a dearth of research on court interpretation of the harassment guidelines as they pertain to racial harassment. Given that racial harassment litigation represents a sizeable amount of the EEOC caseload, is rising at a significant rate, and is very costly to organizations, it would be useful to review the recent case law interpreting the EEOC regulations on the subject. In particular, the review should focus on the area where there is the most confusion and litigation--hostile environment.

Consequently, a LEXIS-NEXIS key word search was conducted that yielded over 200 cases since the Supreme Court set forth its hostile environment guidelines in Faragher v. City of Boca Raton (1998). The authors focused primarily on cases at the appeals court level rather than the district level because the former are more settle and accepted. Over 100 usable cases were identified and examined for guiding principles as to the circumstances that constitute an illegal racially charged workplace. The few district court cases cited are the most recent and illustrate current trends or particular facets of the case law. Cases cited are representative or highlight special issues/circumstances that assist in determining the hostile environment threshold. Recommendations for administrators and legislators are provided.

HOSTILE ENVIRONMENT REGULATIONS

Racial harassment rules (Robertson v. Aon, 2010; Jorden v. City of Cleveland, 2006) are derived from the sexual harassment guidelines issued by the EECO in 1980 (29CFR1604.11).

> Sexual harassment is defined under the EEOC guidelines as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature…when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used

> as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" (29CFR1604.11).

In Meritor Savings v. Vinson (1986), the Supreme Court upheld the EEOC guidelines and distinguished between quid pro quo and hostile environment claims. It is the third definition that deals with hostile environment cases that is the subject of this article.

In Faragher v. City of Boca Raton, the Supreme Court summarized the factors from several other Supreme Court decisions (Harris v. Forklift Systems, 1993; Meritor Savings v. Vinson, 1986) to be considered in determining hostile environment claims filed under Title VII (Faragher v. City of Boca Raton, 1998) and are applied to racial harassment cases(Ford v. Minteq, 2009). First, it must "be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive" (Faragher v. City of Boca Raton, at 286). Second, all circumstances must be examined, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" (Faragher v. City of Boca Raton, at 286).

The Supreme Court pointed out that "Title VII does not prohibit genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and the opposite sex. Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment" (Faragher v. City of Boca Raton, at 286). In fact, the Supreme Court had previously made clear in Meritor Savings v. Vinson that no one is guaranteed a pristine work environment whether the conduct be sexual or racial or some other type of harassment protected under Title VII (Meritor Savings v. Vinson, 1986). The Faragher Court decision underscored this point when it said that the guidelines when properly applied would filter out "the ordinary tribulations of the work place, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing (Faragher v. City of Boca Raton, at 286). Nonsexual racist behavior is not covered by the guidelines. However, these cases do occur.

NONRACIST CONDUCT

Even though nonracist behavior can be boorish and unprofessional and at times may rise to the level of workplace bullying (O'Moore & Lynch, 2007), it is still unprotected activity. For example, in Bledsoe v. State of Tenn,. an African-American secretary filed a harassment charge after two years of management moving her office to the basement, failing to complete a number of her annual performance reviews, being disciplined for minor infractions, and being placed at the bottom of the organizational chart (Bledsoe v. State of Tenn., 2010). Nevertheless, none of these actions were based on race and the district court issued a summary judgment for the defense. Similarly, in Robertson v. Aon, an administrative assistant claimed that she was racially harassed because she was ostracized by her co-workers and received a bad performance review for substandard work. However, the claim was denied because there were no race based insults or epithets directed at her (Robertson v. Aon, 2010). Also, a lessening of job duties is not harassment when there is no change in pay or title, and it cannot be demonstrated that the action was taken because of the employee's race (Austin v. City of Montgomery, 2006).

In another case, Reba Carter v. New Venture Gear, Inc., an hourly worker was called a "bitch" told to "get out we do no want you here"; She was also kicked in the back and endured many other childish pranks (Reba Carter v. New Venture Gear, Inc., at 6). While she was sure that they were all race related, testimony revealed that horseplay was common in the workplace but was not directed at a particular race

nor was the conduct race related. The case was dismissed and later affirmed by the Second Circuit Court of Appeals (Carter v. New Venture Gear, 2009). Similarly, crass statements do not necessarily constitute racial harassment, such as stating management's desire to change the complexion of the department or referring to a black employee as a dunce (Luckie v. Ameritech, 2004).

EQUAL TREATMENT

Unequal treatment of the races can be ruled racial harassment even though it appears nonracist on the surface. For example, reprimanding a black employee for negative job-related behaviors in which her white counterparts engaged without being counseled likewise can be harassment if the criticisms are sufficiently frequent, severe, or pervasive enough (Clay v. United Parcel Service, 2007).

RACIALLY RELATED CONDUCT

A hostile racial environment can generally be classified into three main categories: physical, visual, and verbal. However, cases often comprise a combination of these types of behaviors. Each will be examined in turn. While it is not the focus of this article, it should be pointed out that unless otherwise noted in the cases reviewed, the offending conduct had been made known to be clearly unwelcome.

PHYSICAL CONTACT

Physical contact is generally the most serious form of conduct according to the Faragher court (Faragher v. City of Boca Raton, 1998). Racial harassment cases rarely involve actual physical contact, but there are some that entail physically-related conduct. The most striking case reviewed concerned an African-American laborer that became stuck in a ditch while capping a pipe in the summer of 2008 (Horn v. Quanta Services, 2010).

In this case, as the worker was being helped out of the ditch, the foreman directed the other workers to leave his "black ass in the ditch" (Horn v. Quanta Services, at 2). When the laborer began sinking deeper into the mud, one of the workers dumped a bucket of mud on his head, and then the foreman threaten to pull him out of the ditch by a rope thrown around his neck. He was eventually helped out of the ditch but was forced to strip in order to ride in the truck. The foreman stated that "nobody wants your black ass in their truck" and pretended to take a picture of him (Horn v. Quanta Services, at 2). Prior to this incident there had been a number of verbal epithets over his four month employment where he had been repeatedly called "boy," "n---er," and told to "shut his black ass up" or "move his black ass," and other related comments (Horn v. Quanta Services, at 1). However, the ditch incident by itself was so physically threatening that the district court allowed the case to go to trial.

In another case, there was no physical contact, but a number of African-American firefighters working for the City of Cleveland were physically segregated by race and assigned to a station called "Monkey Island" (Jordan v. City of Cleveland at 479). There, they had to endure racially offensive jokes and insults such as being called "Sambo" and "Welfare Fighter" over a period of about 10 years (Jordan v. City of Cleveland at 477). The appeals court reversed a summary judgment for the city and allowed the case to go trial because the conduct was sufficiently severe to alter the conditions of the plaintiff's work environment (Jordan v. City of Cleveland, 2006).

VISUAL CONDUCT

Racial harassment toward blacks often contains visual behavior that is also physically threatening. This usually involves the use of a hangman's noose related in some way (Horn v. Quanta Services, 2010).

Due to the threatening physical nature of hangman nooses and its documented terrorizing effect on the African-American psyche (Porter v. Erie Foods, 2009), it takes comparably fewer incidents to create a hostile work environment. For example, the Eleventh Circuit of Appeals reversed and remanded a summary judgment for the employer in Green v. Elixir Industries where there were three separate incidents of the use of hangman nooses coupled with numerous racial slurs over a three-year period (Green v. Elixir Industries, 2005). In the first, a hangman's noose was laid across some equipment in a common area and remained for nearly a week (Green v. Elixir Industries, 2005). In the second incident, another employee made a noose and displayed it in front of the plaintiff (Green v. Elixir Industries, 2005). In the last situation, a white employee, upset over the fact that the state might remove the Confederate battle emblem from its flag, made a noose while the plaintiff observed (Green v. Elixir Industries, 2005).

In Mack v. St. Mobile Aerospace, no less than seven nooses were displayed in the workplace over a two-year span along with racial graffiti and racial slurs (Mack v. St. Mobile Aerospace, 2006). One of the nooses had even been placed around the neck of a black figurine. Racial graffiti included nooses around stick figures coupled with racial slurs such as "n---er," "mooley," "damn monkey," and "KKK" (Mack v. St. Mobile Aerospace at 203). Verbal slurs occurred throughout each workday and included such comments as "lazy n---er," "boy," "hey, what's up my n---er," and "your black ass" (Mack v. St. Mobile Aerospace at 204). The Eleventh Circuit of Appeals reversed a summary judgment for the company when it determined that the graffiti and slurs were both frequent and pervasive despite attempts to stop them. The nooses alone were found by the court to be "severe, physically threatening, and humiliating" (Mack v. St. Mobile Aerospace at 205). There was also evidence that minority employees were having trouble performing their job because of the ongoing harassment (Mack v. St. Mobile Aerospace, 2006).

Conversely, in Porter v. Erie Foods, an hourly worker in a food production facility was subjected to three reported instances of co-workers harassing him with nooses over a two-month period. While the court agreed that this constituted a hostile environment, it was not enough to find the employer liable because the employer had acted appropriately in all instances to eradicate the behavior; as a result, the summary judgment for the employer was sustained (Porter v. Erie Foods , 2006). Other cases, observing just one noose involving sporadic racial comments over a long period and a single observation of a noose does not meet the hostile work environment threshold (Barrow v. Georgia Pacific, 2005).

RACTIAL GRAFFITI

In general, any racial graffiti, can rise to the level a hostile work environment if is not removed over time and there have been complaints (Negron v. Rexam, 2004). However, unreported racial graffiti that the company has been attempting to remove and stop is not a violation (Smith v. New Venture Gear, 2009).

FLAGS/DECALS

Certain flags and decals can also create a hostile racial environment; thus courts have allowed employers to ban such items without violating free speech. For example, barring confederate flags and related paraphernalia is not a free speech violation in the public sector as long as they can be shown to be harassing or disruptive to the work environment (Barr v. Steve Lafon, 2008). Private sector employers are

not required to permit such material on their private property (Dixon v. Coburg Dairy, 2003). In Dixon v. Coburg Dairy (2003), a mechanic had a confederate flag on his tool box and was asked to remove the sticker after a minority employee complained. He refused and was terminated. The termination was upheld because his First Amendment right to freedom of expression does not extend to the employer's privately owned workplace (Dixon v. Coburg Dairy, 2003).

VERBAL CONDUCT

Overwhelmingly, hostile environment charges entail verbal comments of a racist nature. In general, verbal comments are considered less serious by the courts as compared to physical contact. As a result, racist comments must be more frequent in order to reach the hostile environment threshold.

In situations where there are only a few racist slurs, a hostile environment does not exist. For example, in Ford v. Minteq Shapes and Services (2009), a black hourly worker was once called gorilla and not allowed to bring his grandchildren to the company Christmas party because of race. The court found the comment and treatment occurred too infrequently to cause a hostile work environment (Ford v. Minteq Shapes and Services, 2009). In another case, a single racial slur such as "they should put those black monkeys in a cage with a bunch of black apes and let the apes f—k them" was not enough to constitute harassment because it was neither severe nor pervasive (Jorden v. IBM at 337). Likewise, in Godoy v. Habersham County Board of Commissioners (2006), a few isolated racial slurs such as get back on the boat and sail to South America were not enough to breach the harassment regulations. Even the single use the N-word coupled with nonracist teasing is not enough to meet the hostile work environment threshold (Hills v. Wal-Mart Stores, 2010).

However, racist slurs that are frequent are another matter. A black elevator fabricator was subjected to frequent racial slurs by his supervisor and others over a three- year period on nearly a daily basis. Comments included, "If I give a n---er ice cream, would he eat it?"… "them n---ers are crazy" and "Them some of the dumbest niggers I ever seen in my life." (Goldsmith v. Bag Elevator at 522). One guy referred to him as a "monkey" on several occasions and also stated "Monkey get back in your cage" (Goldsmith v. Bag Elevator at 523). Lastly, on several occasions he was also threatened with violence by the supervisor. Despite complaints to management, no action was ever taken to correct the situation. As a result, the Eleventh Circuit Court of Appeals upheld the jury verdict for the plaintiff (Goldsmith v. Bag Elevator, 2008).

In another case, an African-American nurse who worked for HealthSouth for two years was subjected to various comments on a daily basis typically beginning with the phrase "you people." For example, "You people always complaining. What you can't handle a little work? That's why you people can't keep a job, you're always complaining about something"; "You people take things too seriously, get back to work"; "What do you people do to your kids? Something is always wrong with them"; "You people have issues"; "Good grief. You people are always changing your hair"; "What you can't handle a little pressure? You people always jumping up and down like a little monkey"(Shockley v. Rebound at 6). The Eleventh Circuit Court of Appeals reversed a summary judgment for the defense and remanded the case on the basis that the verbal comments could be sufficiently frequent, severe, and pervasive"(Shockley v. Rebound, 2008).

In Arnold White v. BFI , a black truck driver for BFI was awarded a $2.6 million dollar judgment after demonstrating to the court that BFI's managers constantly slurred and insulted him racially over several years by calling him—as well as other black drivers—"n----r," "boy," "Zulu warrior," and "porch

monkey," among others (Arnold White v. BFI at 286). Managers would avoid speaking racial slurs in the open or over the radio but would accost black drivers in face-to-face encounters. One was told openly at a picnic that "Boy, you make too much money" (Arnold White v. BFI at 287). It should be noted that given the frequency and the pervasiveness of the harassment, the work environment became hostile long before the plaintiff sued.

Frequency of occurrence is moderated, however, by time in meeting the legal threshold. Several comments that occur over an extended period do not constitute a hostile work environment. For example, in Freeman v. City of Riverdale, (2009) 11 incidents of racially derogatory language during a 13 year career failed to meet the standard. Likewise, 3 incidents of racial animosity over 25 months, with each incident separated by a full year, did represent a hostile environment (Arroyo v. Westlab, 2000).

CONCLUSION

Determination of a hostile environment is not a simple process because each case must be considered in its own context with varying circumstances requiring interpretation of the conduct involved, which is inherently complex. Therefore, it is difficult to present precise directions as to determining an exact legal hostile environment threshold. However, some general guidelines can be provided. Usually, it takes a significant amount of unwelcome racially-related behavior over a considerable period of time to cross the hostile environment threshold point unless it is clearly humiliating and involves physical contact or is physically threatening. Based on the appeals court decisions reviewed, racially-related comments by themselves must generally be more frequent and often take a year or more in order to become hostile unless they are very frequent or a constant basis. Visually related behavior that is severe such as the use of nooses only takes a few instances to create a hostile workplace, but less severe incidents such as verbal graffiti may take many occurrences and months to create a hostile environment. Teasing, joking, or vulgar language are not commonly protected activity.

There were no systematic discernable differences among the various circuit courts. However, this may be due to the comparative lack of usable cases for a number of the circuits.

Administrators are under no legal constraints to withhold corrective action until the hostile environment boundary is breached. Nor are they required to tolerate teasing, vulgar, crass, or unprofessional (racially-related or not) behavior in the workplace. In fact, racially-related behavior and any unprofessional or vulgar conduct can affect workplace productivity and morale long before legal statutes are violated. Although workers are not guaranteed a pristine environment, organizations are well within their legal rights to propagate policies and procedures that have little or no tolerance for such conduct.

This would be particularly important for high profile managerial and media positions as well as government, education, religion, and child care institutions, which are often held to higher social standards due to the nature of their work. It would also be important in other work environments such as hazardous occupations where "horse play" of any type could result in serious injury. In fact, legislators at both the federal and state level should consider tightening the harassment rules governing these types of occupations and work environments.

In any event, it makes much more sense for organizations to disseminate policies that are intolerant of such behavior. These policies may be in addition to or incorporated into the organization's current harassment policy. This accomplishes two important objectives. First, it will minimize legal exposure to

harassment litigation. Second, and perhaps more important, it creates a work environment free from unprofessional and racially-related conduct, however benign, which can only detract from workplace productivity and ultimately affect worker motivation, morale, well-being, and performance.

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