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When one word and one time are too many

by H. Mark Adams, Jones Walker

It is "probably the most offensive word in English."

—U.S. Supreme Court Justice Brett Kavanaugh

In a recent case, the U.S. 5th Circuit Court of Appeals (whose rulings apply to all Louisiana, Mississippi, and Texas employers) ruled one use of a racist term is enough to create a hostile work environment.

Context

Anthony Woods was employed by the city of New Orleans as a maintenance worker and painter at the French Market in the New Orleans French Quarter from April 2013 until August 2019, when he was terminated following a workplace "scuffle." After unsuccessfully appealing his termination to the Louisiana Civil Service Commission, he filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) and received a right-to-sue letter.

Woods filed suit in federal district court in New Orleans against the city, several city officials, and his former supervisor, asserting a plethora of claims, including that he was subjected to a hostile work environment based on his race. With one exception, however, he failed to back up his claims with concrete allegations of fact. The one exception was his hostile work environment claim, which he said was based on a single incident in which his Hispanic supervisor allegedly called him a "Lazy Monkey A__N_____" in the presence of his coworkers. The racial epithet isn't spelled out anywhere in the court records. It doesn't need to be.

District court dismisses all claims

In evaluating Woods' hostile work environment claim, the district court employed the "totality of circumstances" test adopted by the 5th Circuit for determining whether the facts alleged by an employee are sufficient to support such a claim. According to the court, the factors to consider are:

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.

Thus, to support a hostile work environment claim, an employee typically must show a pattern of repeated hostile or offensive behavior by his supervisor based on his race or sex or some other protected factor. Against this backdrop, the district court concluded "a single utterance of a racial epithet, despicable as it is, cannot support a hostile work environment claim" and dismissed Woods' claim.

The district court also dismissed all of Woods' other claims based either on the lack of legal support or because he failed to offer anything more than his own vague and conclusory allegations to support them. *Woods v. Cantrell*, 2021 U.S. Dist. LEXIS 48989: 2021 WL 981612 (E.D. LA, March 16, 2021).

Not so fast, says 5th Circuit

Choosing to represent himself, Woods appealed the district court's dismissal to the 5th Circuit. In its ruling, the appeals court found no fault in the district court's decision, "except in one respect: the hostile work environment claim."

The court acknowledged that some of its previous rulings had "indicated that a single instance of a racial epithet does not, in itself, support a claim of hostile work environment." It also noted, however, other previous rulings in which it said that, "under the totality of circumstances test, a single incident of harassment, *if sufficiently severe*, [can] give rise to a viable [hostile work environment] claim."

The 5th Circuit then joined seven other federal appeals courts (the 1st, 2nd, 4th, 7th, 8th, and 9th Circuits and the D.C. Circuit) in recognizing that "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 [the N-word] by a supervisor in the presence of his subordinates." That word, said the court, "has been further described as 'a term that sums up . . . all the bitter years of insult and struggle [suffered by African Americans] in America, [a] pure anathema to African-Americans, [and] probably the most offensive word in English,'" quoting Supreme Court Justice Brett Kavanaugh when he was a judge of the D.C. Circuit.

Thus, the 5th Circuit concluded that the single incident Woods alleged (being called the N-word by his supervisor in front of his coworkers) was enough to support his hostile work environment claim. The court further noted that if a jury were to believe his allegation, he could be entitled compensatory damages for "emotional pain" and "mental anguish" as well as punitive damages.

Accordingly, the 5th Circuit reversed the district court's decision about Woods' hostile work environment claim and sent the case back to the district court for further consideration and proceedings, possibly including a trial by a jury of Woods' peers. *Woods v. Cantrell*, No. 21-30150 (5th Cir., March 24, 2022).

Takeaway

Words have consequences.

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