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11th Circuit Tosses Race Bias Case Over Use of Word 'Boy' -- Again

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In its 2006 opinion in *Ash v. Tyson Foods Inc.*, the U.S. Supreme Court found two errors of law in the 11th Circuit's opinion that was then under review. In doing so, the Supreme Court made some significant statements about the standard for finding pretext in employment discrimination claims, and whether calling an African-American man "boy" can be racially offensive. The ongoing resolution of *Ash* has been a closely watched case by many practitioners, and the 11th U.S. Circuit Court of Appeals has potentially concluded it with a surprising opinion last month in *Ash v. Tyson Foods Inc. (Ash IV)* .

The surprise is not necessarily about the results of the decision, but in the way the circuit judges avoided discussing the issues addressed by the Supreme Court. The opinion indicates that it took the Supreme Court's instructions into account, yet it still came to the same conclusion. In doing so there was little explanation of how it incorporated the Supreme Court's concerns.

According to the decision, the basic facts of the case are as follows. John Hithon and other employees filed a claim of employment discrimination against Tyson Foods Inc. They alleged that they were passed over for a promotion when a manager hired two white male shift supervisors in lieu of promoting any of the six superintendents already at the plant, five of whom were African-American. Part of their evidence of discrimination was testimony about the manager referring to African-American employees as "boys." For example, "boy, you better get going," and, "hey, boy."

Whether referring to someone as "boy" is evidence of racial discrimination has been litigated in multiple cases with varying results. The Supreme Court's opinion in *Ash* is well known for its acknowledgement that a generally benign word like "boy" is not always used in a benign way: "Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign," the court said.

Originally, the plaintiffs won a substantial jury verdict of $250,000 in compensatory damages and $1.5 million in punitive damages, the *Ash IV* opinion said. In response to a motion by Tyson Foods, the district judge found the evidence was sufficient for the jury to find for Hithon, but Tyson was entitled to a new trial because there was insufficient evidence for the awarded damages.

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In its 2005 opinion in *Ash II* , the 11th Circuit affirmed the grant of a new trial. However, the 11th Circuit's opinion was essentially reprimanded on two important points by the Supreme Court. The Supreme Court, in a short per curium opinion in 2006, took issue with the ease with which the 11th Circuit brushed off the complaint regarding the use of the word "boy." According to the 11th Circuit's opinion in *Ash II* , absent any specific labeling, such as "black boy," there was no racial connotation about using the word "boy." While a history and analysis of the use of the word "boy" in a racial context is beyond the scope of this article, there is certainly a sentiment that calling African-Americans "boys" can be, depending on context, a derogatory racial term suggestive of past injustices against African-Americans in this country. The Supreme Court likewise did not discuss this, and instead simply pointed out what seemed obvious, that "the speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage."

The second area of the 11th Circuit's 2005 opinion that the Supreme Court took issue with was its explanation of how one identifies pretext. The 11th Circuit, in *Ash II* , took the stance that, in determining if an employer's reasons are pretext for discrimination, the evidence of pretext should be "so apparent as virtually to jump off the page and slap you in the face." The Supreme Court struck this requirement down as being too extreme when there are various standards in use by courts for identifying pretext.

Ash eventually went back down the ladder and Hithon got a new trial. Once again, the jury found in his favor. The jury awarded $35,000 in back-pay, $300,000 in compensatory damages, and $1 million in punitive damages. Once again, the district judge found insufficient evidence for punitive damages. Both parties appealed.

The 11th Circuit reversed and remanded, agreeing with Tyson Foods' position that it had offered sufficient race-neutral reasons for Tyson Foods' decisions. The 11th Circuit made a clear point that it was not using the "slap in the face" standard the Supreme Court had admonished it for, and instead presented the use of no standard whatsoever. The 11th Circuit did not discuss how to identify pretext. It took Tyson Foods' proffered reasons and held them up against each individual contest that the plaintiff brought, rather than looking at the dispute in its totality. In doing so, the judges appeared to have made a factual assessment completely contrary to the decisions of two separate juries.

The 11th Circuit once again found no credence to the alleged racially charged use of the term "boy." During the second trial, Hithon's counsel explained that she was presenting evidence of how the manager used the word "boy" and how the plaintiffs and other witnesses interpreted that usage, because "the Supreme Court's opinion had instructed that attention should be paid to 'tone, inflection, and context' in the use of the word and that she intended to develop those facts through witness testimony." The 11th Circuit brushed Hithon's testimonial evidence aside, saying it was of no import how the plaintiff or others interpreted the statements. It said that it could only revisit its former conclusion of law, specifically that the use of "boy" was not racial, if "new and substantially different evidence" was presented. The court said there was no such evidence.

That the 11th Circuit's decision to give little value to witness testimony on an important issue would appear to fly in the face of the Supreme Court's admonition that one must consider such things as "context, inflection, tone of voice, local custom and historical usage." This is perhaps best presented through live testimony. Clearly, two separate juries were convinced that discrimination had occurred. Despite this, the court looked to the cold record.

Perhaps the most notable part of the court's discussion of the "boy" issue is the attention it paid to admonishing the plaintiff's counsel for equating its use to the "n" word. The court disavowed the appropriateness of using the "n" word because it could have misled the jury, but gave no consideration whatsoever to the point the attorney was trying to make or whether or not in a historical context the attorney may have been correct, as suggested by the Supreme Court.

Notably, the opinion is unsigned and unpublished. But the third member of the panel, Judge David D. Dowd, sitting by designation from the Northern District of Ohio, wrote a brief and succinct dissent indicating that he would have affirmed the jury's decision and reduced the punitive damages.

Without having heard the live testimony, read the briefs, or heard oral arguments, it is of course difficult to question a circuit court's decision. Two different juries found in favor of the plaintiffs, though it was never clear how the juries came to their respective conclusions.

What is perhaps most disappointing about this result is that the opinion made a point of saying it was abiding by the Supreme Court's previous instructions, but did not elaborate into how it was doing so. It did not discuss how to identify pretext, nor did it attempt to analyze the tone, inflection or context of the term "boy." If nothing else, this decision probably holds in place the viability of claims alleging discriminatory sentiment shown through otherwise neutral language. If the case gets appealed to the Supreme Court again it will be interesting to see how the justices handle it a second time. •

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