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Employment Law

Court: Single Use of Racial Slur Enough to Create Hostile Work Environment

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In the category of decisions that should surprise no one, an appeals court in New York overturned a district court dismissal of a case where a supervisor allegedly referred to a subordinate as "you fucking n-----." At issue in the case of *Daniel v. T&M Protection Resources*, Case No. 15-560 (2d Cir. April 25), was whether a single, offensive comment (use of the N-word) was sufficient to overcome summary judgment on the plaintiff's hostile work environment claim.

The facts forming the basis for the appeals court's decision emanate from the district court's summary judgment opinion (see *Daniel v. T&M Protection Resources*, 87 F.Supp.3d 621 (S.D.N.Y. 2015)). Otis Daniel, a pro se plaintiff, worked as a fire safety director for T&M Protection Resources at 590 Madison Avenue in Manhattan. Daniel alleged that he was subjected to a hostile work environment throughout his employment and ultimately terminated because of his race, perceived national origin, and perceived sexual orientation, and in retaliation for his complaints about the discriminatory treatment he experienced, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq., and New York State and New York City anti-discrimination statutes.

According to the facts recited in the district court opinion, Daniel is a black man from St. Vincent and the Grenadines, a small island in the Caribbean. He moved to the United States at age 13, and although he identifies as gay, did not disclose his sexual orientation to his supervisors or co-workers at T&M. In February 2011, Daniel began working at 590 Madison as a fire safety director under the direct supervision of John Melidones.

Daniel testified as to a series of incidents based on his race, perceived national origin, and perceived sexual orientation. For example, in his first week on the job, Melidones told him that property managers near 590 Madison generally "prefer to hire white security personnel" and that he was "paying [Daniel] too much." About six months later, Melidones told Daniel, "Smile; you look like a gorilla; why the angry face, smile." Between February and September 2011, during a time when Daniel and Melidones worked overlapping shifts, Melidones allegedly told 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." In 2012, Melidones purportedly asked Daniel, "Are you going to vote for your man, Obama?"

Daniel also testified that Melidones made derogatory statements about Daniel being from England (though he was not); he mocked Daniel's accent; asked Daniel to define large words; and told

Daniel to "go back to England." Melidones was also accused of harassing Daniel based on his perception that he was gay, including one instance where Melidones brushed up against Daniel's buttocks, rubbed his genitals on him and asked Daniel, "Are you gay?"

According to the lower court's opinion, the tensions between the employee and his supervisor came to a head on May 4, 2012, when Melidones instructed Daniel to go upstairs to Bain Capital and speak with Bain's office manager about an employee who was going to be terminated. Rather than physically going upstairs to the Bain office, Daniel instead called the office manager on the telephone. Merely seconds later, Melidones called Daniel and launched into a "screaming, belligerent, profanity-laced tirade." According to the complaint, Melidones allegedly said: "'Who told you to call? Who told you to call? You fucking idiot, shut the eff up, don't say a fucking word you fucing idiot, nig' (n-----)." Melidones then slammed the phone down and hung up.

Within a week of this incident, Daniel was under investigation by Melidones for purported violations of company policy. This was around the same time that Daniel filed a formal complaint with the assistant property manager about Melidones' harassing behavior. Within a week thereafter, Daniel was fired for "having his personal [packages] and mail delivered to the lobby of his worksite" and "accepted delivery of an extremely realistic looking Smith and Wesson BB Gun."

Daniel filed an administrative complaint alleging discrimination with the Equal Employment Opportunity Commission (EEOC) and the New York State Division of Human Rights (DHR). The DHR concluded that Melidones's statements "may rise to a certain level of insensitivity but not to an actionable degree under discrimination law" and found that T&M had articulated "legitimate and nondiscriminatory business reasons" for Daniel's termination that were neither "pretextual nor otherwise unworthy of credence." The instant lawsuit was filed thereafter.

The district court analyzed Daniel's hostile work environment claims under the *Faragher/Ellerth* standard, which is to say that the harassment must be objectively severe or pervasive; create an environment that the plaintiff subjectively perceives as hostile or abusive; and create such an environment because of the plaintiff's protected class. In the opinion of the lower court, Melidones's use of a racial slur while yelling at Daniel on one single occasion "although reprehensible, cannot, by itself, sustain a hostile work environment claim." As a result, Daniel's claims were dismissed.

On appeal, the U.S. Court of Appeals for the Second Circuit was asked to review whether the one-time use of the slur from a supervisor to a subordinate can, by itself, support a hostile work environment claim. The district court relied on *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997), to conclude that the single use of a racial epithet does not create a hostile work environment. The appeals court, however, said not so fast.

Schwapp states that, "for racist comments, slurs, and jokes to constitute a hostile work environment, there must be more than a few isolated incidents of racial enmity, meaning that, instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments." "Thus, whether racial slurs constitute a hostile work environment typically depends upon the quantity, frequency and severity of those slurs, considered cumulatively in order to obtain a realistic view of the work environment." The district court, therefore, erred in limiting the *Schwapp* holding by foreclosing the possibility that the one-time use of a severe racial slur could, by itself, support a hostile work environment claim when evaluated in the cumulative reality of the work environment.

The appellate decision also took a swipe at the district court's narrow reading of more recent case law that held that 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 "n-----" by a -

supervisor in the presence of his subordinates (see *Rivera v. Rochester Genesee Regional Transportation Authority*, 743 F.3d 11, 24 (2d Cir. 2014)). In other words, use of the N-word trumps just about everything else in the realm of hostile work environments.

What I find so interesting about this holding is how the district court went through painstaking detail to lay out the facts and the relevant law, including a discussion on the importance of the "totality of the circumstances," yet failed to consider precisely that. There was more than sufficient evidence for a fact-finder to conclude that Daniel was subjected to a racially hostile work environment, between the racist insinuations, epithets and innuendos. When this is coupled with the one-time use of the N-word, this should have been case closed. Fortunately, the appeals court saw fit to snatch victory from the jaws of defeat. •

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