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COMMENTARY

Recent Racial Harassment Decisions Leave Employers Scurrying on Defense

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Employment Law

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Last month this column explored a recent spate of racial harassment cases filed by the Equal Employment Opportunity Commission (EEOC). Just a month later there are another pair of racial harassment decisions showing why employers need to pay close attention to employee complaints. The two cases hail from differing parts of the country, one of which is from our neck of the woods, yet the sting of the alleged harassment can be felt far and wide.

'Bates v. Montgomery County'

On Sept. 17, a decision was rendered in the U.S. District Court for the Eastern District of Pennsylvania case of *Bates v. Montgomery County,* Civil Action No. 20-2956 (E.D. Pa. September 17, 2021) (Tucker, J.). The plaintiff is an African American man who held multiple positions at the county's correctional facility where he served as a captain.

Bates alleged that he endured racial slurs by his coworkers and supervisors and that the workplace permeated with discriminatory intimidation, ridicule, and insult to the point where it altered his employment and created an abusive working environment. According to the decision, the first alleged discriminatory action occurred in 1999 when a fellow officer referred to Bates as "f***ing useless." The following year, a maintenance supervisor threatened that he would bring Bates "back 100 years [to a time significantly closer to slavery]." About a year later, another officer began to refer to Bates as "H.N.I.C." or Head N-word in Charge.

The harassment resumed in 2005 when a fellow officer called Bates a "trained monkey" on at least two occasions and encouraged his subordinates to "blame their issues on the Black man." Other officers called Bates and other Black employees the "n-word." On Jan. 23, 2018, Bates was demeaned in front of other staff members when asked "why is this Black dummy on the floor?!" Despite repeated attempts to address the situation, the warden of the facility allegedly told Bates that "if this complaint doesn't go away, he's fired."

After Jan. 19, 2019, Bates alleged the discrimination and harassment intensified when an officer began to question his qualifications, suggesting he was just a "fill-in" and that he wasn't a "real Captain." Several months later Bates was scorned for doing "typical n***** shit." Meanwhile, the warden became more aggressive in demanding that Bates drop his grievances purportedly telling Bates to withdraw his complaints "or else."

Bates' complaint survived the county's motion to dismiss because it satisfied the five elements required to prove a hostile work environment: intentional discrimination because of a protected class, that is severe and pervasive, had a detrimental effect, would detrimentally affect a reasonable person, and that respondent superior liability exists. The court also allowed Bates' claim pursuant to 42 U.S.C. Section 1983 against the county to go forward on the theory that the complaint sufficiently established that the county, under the leadership of the individual defendants, created a policy of promoting non-black employees, in violation of Section 1983. Further, the Section 1983 claims were not duplicative of the Title VII claims, the court held.

Interestingly, the court dismissed Bates' Section 1981 claim. A Section 1981 claim requires a plaintiff to show that: he is a member of a racial minority; the defendant's intent to discriminate on the basis of race; and discrimination concerning one or more of the activities enumerated in the statute, which includes a right to make and enforce contracts. Here, the court dismissed the claim (without citation) reasoning that Bates was an at-will employee and failed to allege any contract with the individual defendants. Virtually every circuit to have decided the matter has said that an at-will employment contract is sufficient for 1981 purposes. The Supreme Court has also adjudicated at least

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two 1981 cases brought by at-will employees (*Patterson v. McLean Credit Union,* 491 U.S. 164 (1989) and *CBOCS West v. Humphries,* 553 U.S. 442 (2008)) and declined to dismiss them on that basis.

'Diaz v. Tesla'

It will be interesting to see just how far the *Bates* case progresses given that it has a similar set of facts to a very sizable jury verdict rendered in *Diaz v. Tesla*.

The *Diaz* case was initiated in 2017 by three plaintiffs who worked in different areas of a northern California Tesla factory. All three employees alleged that they were targets of racially motivated abuse. Owen Diaz, an elevator operator, was the remaining plaintiff in the suit after one was sent to arbitration and the other reached a settlement. At trial, Tesla was off to a rocky start during jury selection when its counsel tried to use peremptory challenges to exclude two African American jurors.

Diaz' attorney responded with a *Batson* challenge, arguing that peremptory challenges may not be used to exclude jurors based on their race. In order to survive the *Batson* challenge from Diaz' attorney, Tesla needed a race-neutral reason for excluding those jurors. For example, one juror said he had suffered racial discrimination at work and Tesla argued that the strike was not race-based but rather based on his bias from that experience of discrimination. The court held that excluding the juror because he suffered discrimination based on his race was not a race-neutral reason.

The initial complaint had described the work environment as a scene straight from the Jim Crow era and at trial the jury got to hear detailed accounts. Diaz testified through tears about being the target of racial slurs. He and another witness recounted seeing racist drawings posted around the factory. Diaz was called the N-word repeatedly, as well as "boy," which he explained is

demeaning and reminiscent of how slave masters spoke to Black people. For Diaz, being the subject of racial taunts at work felt like someone was holding him under water. This ongoing treatment negatively impacted his sleep as well as his appetite. After his complaints to his supervisors were brushed off repeatedly, Diaz could no longer endure the racially charged atmosphere and he quit.

Additionally, the jury heard testimony from Anthony Redding, a University of California psychologist who specializes in workplace stress. Redding explained that when Diaz' complaints to supervisors about racial abuse were ignored, he was left with a sense of fear and hopelessness. Upon examining Diaz, Redding found that his fear, anxiety, difficulty sleeping, and irritability, indicated that he had suffered a psychological injury. The jury also heard expert testimony from Amy Oppenheimer who found that Tesla failed to meet the standard of care, despite having adequate anti-harassment policies.

Diaz' attorney said the jury found that Tesla failed to take reasonable steps necessary to prevent the harassment and that Diaz was harmed by Tesla's negligent supervision or continued employment of a harassing co-worker. After only four hours of deliberation, the jury awarded Diaz $4.5 million for past emotional distress, $2.4 million for future emotional distress, and an additional $130 million in punitive damages.

When comparing the *Diaz* and *Bates* cases, it appears that the underlying harassment is just as pervasive and egregious in both instances. The allegations in the *Bates* case, however, span a longer period of time, with Bates also claiming loss of employee benefits and retaliation, in addition to the emotional harm, for over a decade. One could easily see a jury expressing similar outrage against the correctional facility where Bates worked. It would not be the least bit surprising to see a sizable punitive damage verdict against the county.

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