Employment Law

Sex-Based Profanity, Even if Directed at Others, Can Create Hostile Workplace

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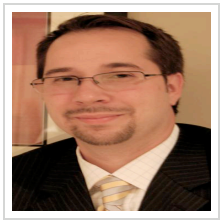
The Legal Intelligencer | January 29, 2010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For years, courts have grappled with what type of conduct constitutes a hostile work environment. Most courts have consistently held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), does not create a workplace code of civility. A recent 11th U.S. Circuit Court of Appeals decision, however, has added a wrinkle to the way courts should interpret Title VII claims.

While the 11th Circuit is not the first court to find offensive language in the workplace to be actionable, the recent landmark decision and corresponding opinion in *Reeves v. C.H. Robinson Worldwide Inc.* can be read as a strongly worded warning to employers who allow or ignore gender slurs and inappropriate conduct. The en banc decision unanimously reverses a finding of summary judgment for the employer and holds that a plaintiff may bring a hostile work environment claim based on sex even when the discriminatory conduct and language is not specifically directed at the plaintiff.

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The plaintiff in *Reeves* asserted a claim of hostile work environment under Title VII, which requires a showing that she was discriminated against because of her protected class (in this case, sex) and that the offensive conduct was severe or pervasive such that it alters the terms or conditions of her employment. Because of these requirements, to some extent, there has been an understanding that the law requires the offensive language or conduct be directly aimed at the plaintiff.

However, *Reeves* instructs that "a plaintiff can prove a hostile work environment by showing severe or pervasive discrimination directed against her protected group, even if she herself is not individually singled out in the offensive conduct."

The court recites, defines and discusses the gender slurs that were allegedly used in Ingrid Reeves' workplace and describes the details of the inappropriate conduct of Reeves' co-workers. The profanity that Reeves allegedly endured is not fit for print in this column.

In sum, Reeves was the only female in a six-cubicle "pod" of transportation sales representatives and there was only one other woman on her floor. One day Reeves' manager got frustrated on a sales call and turned to Reeves and told her to "talk to that stupid b[----] on line 4," as noted in the opinion. She soon learned that this would not be an isolated event, as her manager and co-workers regularly used derogatory and sexual terminology when talking about the women they spoke to on sales calls, Reeves alleged. The men also regularly listened to a radio program during which vulgar sexual acts, masturbation and intimate parts of a woman's body were discussed.

On one occasion, Reeves alleged she observed a co-worker looking at a pornographic image on his computer, as noted in the opinion. She also allegedly heard her male co-workers refer to the only other woman on the floor with gender slurs, as well as comment on her body, the opinion said. The plaintiff alleged that every day of work for almost three years she listened to her male co-workers and branch manager speak about women in a degrading, humiliating manner.

Reeves alleged she made multiple complaints to her co-workers and manager, as early as her first week of work. She was consistently ignored or was given empty promises that language would be monitored more closely. Reeves testified that when she tried changing the radio station during a program laced with profanities that the other employees would soon change the radio back to the offensive program.

After her complaints to company executives allegedly went unheeded, Reeves resigned.

The court noted that this would be "a very different case" if "indiscriminate insults and sexually-laden conversation did not focus on the gender of the victim." However, much of the language and conduct that the plaintiff alleges went on involved epithets that would be particularly offensive to women. The 11th Circuit found no merit in the employer's proffered defense that some of the epithets were also used to talk about men. Examining the meaning behind these words, the court explained that the purpose of using those words toward a man is to insult the man "by comparing him to a woman, and, thereby, could be taken as humiliating to women as a group as well."

The en banc panel of the 11th Circuit also found particular fault with the employer's implicit allowance of this behavior, resolving that a jury could find intentional discrimination when an employer allows the conduct to continue. The tersely worded opinion gave little regard to the employer's defense that this was not discrimination since the language was used prior to Reeves' employment, recognizing that an employee has a right to be free from such a degrading workplace regardless of what it was like before she started working there.

There should be little or no concern about the *Reeves* decision opening the floodgates to litigation over workplace language use, as the court was clear to remind us that "not all profane or sexual language or conduct" is actionable. It is actionable when "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed," the opinion noted, citing *Harris v. Forklift Sys. Inc* . In this case, the alleged actions of watching porn, listening to women masturbating on the radio and using crude language to label co-workers went beyond the scope of what one can expect at work.

The import of this case is that it permits a claim of gender discrimination even if the plaintiff is not an individual victim of attack. "It is enough to hear co-workers on a daily basis refer to female colleagues as 'b[-----],' 'w[----]' and 'c[---],' to understand that they view women negatively, and in a humiliating or degrading way. The harasser need not close the circle with reference to the plaintiff by specifically saying 'and you are a "b[----]," too,'" the opinion said, citing *Yuknis v. First Student Inc* . •

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