Workplace Rules

The Information Maryland Local Government Employers Need to Know June 2015

THE ISOLATED USE OF RACIAL EPITHETS IN THE WORKPLACE *CAN* CREATE A HOSTILE WORK ENVIRONMENT

Can an employee's isolated use of racist language in the workplace create a racially hostile work environment in violation of Title VII of the Civil Rights Act of 1964? A recent case, *Liberto v. Fontainebleau Corporation*, decided by the United States Court of Appeals for the Fourth Circuit (No. 13-1473, May 7, 2015) says the answer may very well be "yes".

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The case was brought by Reya Boyer-Liberto, an African-American and former cocktail waitress at the Clarion Resort Fontainebleau Hotel in Ocean City. She alleged that, on two occasions, over two consecutive days, another employee, who she believed was a manager, or, at least, had management's ear, called her a "porch monkey" and threatened her employment. Liberto also alleged, that, shortly after she complained about what had happened, she was terminated for poor performance. Liberto sued under Title VII of the Civil Rights Act of 1964, claiming the existence of a hostile work environment and retaliation.

After lengthy legal proceedings, the case was argued in the appeals court in September 2014. That court issued its opinion on May 7, 2015. The opinion is important because it recognizes that a racially hostile work environment can happen or be in progress through *isolated instances* of discriminatory conduct. Prior to this decision, the rule of thumb had been that hostile work environments generally result only after repeated conduct, not isolated events. Generally, conduct must be repeated to make it sufficiently "severe" or "pervasive", and only sufficiently "severe" or "pervasive" conduct gives rise to a hostile work environment. So, generally speaking, the mere utterance of an isolated epithet, or simple teasing, or offhand comments have repeatedly been deemed insufficient to create a hostile work environment. The exception is when the conduct in question is "extremely serious".

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Can use of a particular racial slur be seen as "extremely serious"? Yes, said the court in this case. The court said that the "chosen slur – 'porch monkey' – is about as odious as the use of the '[n-word].' " The court went on to say that describing an African-American as a "monkey", and thereby suggesting that a human being's physical appearance is essentially a caricature of a jungle beast, "is degrading and humiliating in the extreme." As such, the court ruled that a jury would have to ultimately decide if the two uses of the "porch monkey" epithet were severe enough to create a hostile work environment or one that was in progress.

The court also measured the severity of the harassing conduct by the status of the alleged harasser. In this regard, we know that a supervisor's use of a racial epithet impacts the work environment far more severely than use by co-equals. Also, and unlike the conduct of a co-worker, the conduct of a supervisor is far more easily imputed to the employer. In this case, the court concluded that Liberto should be given the chance to prove to a jury that she reasonably believed her alleged harasser was far more than a co-worker, and, instead, someone she believed could impact her very employment.

So, what local governments and private employers in the Fourth Federal Circuit (which includes Maryland) must take away from this case are the following: (1) Hostile work environments may be fully formed or in progress; (2) The use of a racially charged epithet (such as the n-word or "porch monkey"), even in isolated instances, may be sufficient to create a hostile work environment or one in progress, depending on the status of the person using such language; (3) An employee who complains about what he/she reasonably believes (based on the severity of the harassment) to be a hostile work environment or one in progress engages in protected conduct under Title VII; and (4) Under Title VII, an employer cannot retaliate against an employee for engaging in protected conduct.

This case is very important and is available for reading and downloading at:
http://www.ca4.uscourts.gov/Opinions/Published/131473A.P.pdf

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