

THURSDAY, AUGUST 10, 2000

OUTSIDE COUNSEL

By Louis Pechman

The Language of Harassment

Words alone can create an unlawful hostile work environment under the discrimination laws. Given the complexities of work relationships and the richness of the English language, however, the determination of when words create an unlawful environment often seems like a Sisyphean task. Nonetheless, a review of recent New York cases illustrates that there is a consistent framework for analyzing these cases even though — as they say in commercials — individual results may vary.

Claims for hostile work environment discrimination are still examined under the standard enunciated by the U.S. Supreme Court's 1986 decision in *Meritor Savings Bank v. Vinson*.¹ A workplace permeated with "discriminatory intimidation, ridicule, and insult" which is "sufficiently severe or pervasive to alter the conditions of the victim's employment" constitutes a hostile environment.²

After nearly fifteen years of litigation



Louis Pechman is a partner with Berke-Weiss & Pechman LLP in New York.

under the *Meritor* standard, it is clear that there is no magic number of incidents that automatically triggers a finding of a hostile work environment. Indeed, the Supreme Court, in *Harris v. Forklift Systems, Inc.*,³ recognized that the *Meritor* standard "is not, and by its nature cannot be, a mathematically precise test." Rather, the trier of fact must

look to all of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."⁴

Determining whether a work environment is hostile or abusive depends on the "totality of circumstances."⁵ The U.S. Court of Appeals for the Second Circuit has recently pointed out that, as a general matter, "isolated remarks or occasional episodes of harassment do not constitute a hostile environment."⁶ In order to be actionable, "the incidents of harassment must occur in concert or with a regularity that can be termed pervasive."⁷ In a similar vein, the Supreme Court has cautioned that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."⁸

In *Richardson v. New York State Department of Correctional Service*,⁹ the Second Circuit recently noted that generally the same standards apply to both race-based and sex-based hostile environment claims. Ms. Richardson, an African-American female, alleged a racially hostile environment existed at the two correctional facilities where she had worked. With respect to the first facility, the court noted that Ms. Richardson had stated a claim for hostile work environment based on the following incidents that occurred over the course of her three and one half year employment: one of her supervisors referred to Blacks as "apes or baboons" and stated that African-Americans are "so dark you cannot see them"; one coworker referred to her as a "light-skinned nigger"; another called her a "nigger"; a third went out of his way to use the word "nigger" in her presence; others circulated a joke that disparaged Blacks and referred to them as "niggers"; and still others used the terms "spooks" and "Buckwheats" to refer to African-Americans. The court concluded that "a reasonable person could find her working conditions altered for the worse." On the other hand, Ms. Richardson's employment at the second correction facility, where she was subjected to only one reference to her race (i.e., that all the black inmates look alike) did not suffice to state a hostile environment claim. The court's analysis for

each of Ms. Richardson's work environments was the "totality of the circumstances," evaluating the quality, frequency and severity of the incidents in a cumulative manner.

Comments which take place outside an employee's presence may be relevant to a claim of a hostile environment. In *Torres v. Pisano*,¹⁰ the Second Circuit noted that "an employee who knows that her boss is saying things ... behind her back may reasonably find her working environment hostile." Similarly, in *Schwapp v. Town of Avon*,¹¹ the Second Circuit found evidence of discriminatory statements made out of the presence of an African-American police officer was probative of the "totality of the circumstances."

Recent Cases

Recent district court decisions illustrate the types of verbal comments that warrant a trial to determine whether a hostile work environment exists. In *Newton v. Shell Oil Co.*,¹² Judge Goettel predicted that it was "doubtful" that the following conduct by a coworker responsible for training a female transportation analyst amounted to a hostile work environment based on sex: calling her a "wench" in her presence, referring to her as a "cunt" outside her presence, and calling her a "woman" in a derogatory manner on frequent occasions. Nonetheless, Judge Goettel concluded that whether this conduct was sufficiently severe or pervasive to alter the conditions of her employment was for the jury to decide.

In *Mitchell v. Fab Industries*,¹³ Judge Sweet held that a clerk for a textile manufacturer established a prima facie case of hostile work environment based on sexual and religious discrimination. A licensed Pentecostal Missionary, she was repeatedly subjected to religious profanity by her supervisor, including "Jesus, Jesus, f___ you, kiss my ass." The supervisor also allegedly cursed at her, called her "bitch" and "bastard," threatened to pull the curls out of her head, and shook his buttocks in her face — all within a period of four months. Judge Sweet found that a "reasonable Pentecostal missionary" could find such a workplace hostile.

In *Suber v. Pitney Bowes, Inc.*,¹⁴ an African-American male claimed a hostile environment based on the distribution of a memorandum by his supervisor with a post-script reading: "P.S. NO NIGGERS PLEASE," and the alleged slurs of "nigger" repeatedly directed at him by a coworker. Although Judge Baer doubted that the memorandum standing alone created an actionable hostile work environment, when viewed in conjunction with the slurs, he found that the "totality of the circumstances" warranted a trial.

In *Stembridge v. City of New York*,¹⁵ an African-American analyst for the New York City Department of Transportation

continued over

BERKE-WEISS & PECHMAN LLP
ATTORNEYS AT LAW

488 MADISON AVENUE, NEW YORK, NEW YORK 10022
212-583-0500 • FAX 212-308-8582
www.bwp-law.com

was referred to by management personnel as an "uppity nigger" and "boy." These two comments, along with five other less provocative incidents, which occurred over a three year period, did not, according to Judge Motley, create a work environment permeated with racial hostility.

In *Arroyo v. WestLB Administration, Inc.*,¹⁶ a Hispanic male foreign exchange clerk was disparaged by a fellow clerk who called him a "f**king spic," a "f**king asshole," and wetback. Judge McKenna ruled that "the comments, while offensive and inexcusable, were isolated and sporadic in nature, falling to rise to the level of pervasiveness required to recover under Title VII."

And in *Dayes v. Pace University*,¹⁷ a female office worker claimed her direct supervisor made sexually offensive comments to her. Judge Pauley found, however, that "[t]he handful of comments that plaintiff describes are interspersed over a one-year period and uniformly mild in tone" and therefore did not meet the severe and pervasive threshold.

Is Once Enough?

The Second Circuit has acknowledged that a single incident of sexual assault may be severe enough to alter the conditions of the victim's employment and create an abusive work environment for purposes of Title VII liability.¹⁸ In general, however, New York courts have been reluctant to hold the utterance of a single epithet to be sufficiently severe to sustain a hostile environment claim. For example, in *Khan v. Abercrombie & Fitch*,¹⁹ an African-American female's allegation that a hostile work environment existed due to a coworker's single reference to her as a "black bitch," was insufficient to sustain a claim of hostile work environment. Nor was a hostile work environment created in *Adeniji v. Administration for Children Services*²⁰ where a Black Muslim male from Nigeria asserted a claim based on a coworker's comment that "you [are] not a king in Africa anymore ... you are subject to the rules of our office." Similarly, in *Owens v. Morgan Stanley & Co., Inc.*, a racist e-mail message, which the court characterized as "reprehensible" was insufficient, by itself, to establish a claim of hostile work environment.²¹

In *Howley v. Town of Stratford*,²² the Second Circuit found that a female firefighter for the Town of Stratford presented sufficient evidence of a hostile environment on the basis of her humiliating treatment during a meeting with a group of firefighters, where plaintiff was the only female. At the meeting, a subordinate told her "shut the fuck up, you fucking whining cunt," subjected her to inappropriate remarks about her menstrual cycle, and told her that she did not make assistant chief because she did not "suck cock good enough." The Second Circuit found that this tirade could result in an intolerable alteration of plaintiff's working conditions. The court pointed out that:

In an occupation whose success in preserving life and property often depends on firefighters' unquestioning execution of line-of-command orders in emergency situations, the fomenting of a gender-based skepticism as to the competence of a commanding officer may easily have the effect, among others, of diminishing the respect accorded the officer by subordinates and thereby impairing her ability to lead in the life-threatening circumstances often faced by firefighters.²³

First Amendment

The juxtaposition of the ferocity of the verbal harassment with the undermining of a plaintiff's status in the workplace was also critical to the determination of the Supreme Court of New Jersey in *Taylor v. Metzger*.²⁴ In that case, the plaintiff, a county sheriff's officer, had been employed by the Burlington County Sheriff's office for 20 years when she was referred to by the Sheriff as "the jungle bunny." The court held that the single utterance of this racist slur could create a hostile work environment given that it was directed against the plaintiff by the chief ranking supervisor in the presence of another supervisor. The court reasoned that the Sheriff "did more than merely allow racial harassment to occur at the workplace, he perpetrated it. That circumstance, coupled with the stark racist meaning of the remark immeasurably increased its severity."²⁵

In *Taylor v. Metzger*, Justice Marie Garibaldi, in dissent, disputed the finding of a hostile environment, because there was no change in the plaintiff's working conditions as a result of the incident. Judge Garibaldi's dissent was also notable in that she raised a First Amendment concern:

Recognizing the chilling effect such a holding would cast over a person's freedom of expression, most courts do not find words of bigotry or racism to constitute actionable defamation, thus protecting the freedom to express even unpopular, ugly and hateful, political, religious and social opinions. Although the Sheriff's remark was morally repugnant and reprehensible, I believe that it was not severe enough to result in a ... violation [of the New Jersey Law Against Discrimination (LAD)]. The court has come perilously close to punishing the Sheriff not for creating a hostile work environment under LAD, but solely for his speech.²⁶

Circuit Judge Edith Jones, writing for a unanimous panel of the U.S. Court of Appeals for the Fifth Circuit in *De Angelis v. El Paso Mun. Police Officers' Ass'n*,²⁷ has also expressed concern that hostile work environment claims based on words alone may infringe on First Amendment rights. Judge Jones noted that "[w]here pure expression is involved, Title VII steers into the territory of the First Amendment."²⁸ Judge Jones suggested that this problem should not be denied or minimized because "when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial, or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech."²⁹ Surprisingly, few other courts have addressed the potential tension between the first amendment and hostile work environment claims based on otherwise free speech.

Conclusion

Schoolyard bullies may still be deterred by their targets with the refrain that "sticks and stones may break my bones, but words will never harm me." But victims of unlawful harassment in the workplace do not have to rely on Milquetoast rhymes, for under the discrimination laws, victims of verbal harassment can pursue claims for compensatory and punitive damages. Comments that used to merely provoke a

verbal rebuke may now trigger litigation, and employers have become the de facto guardians against discriminatory harassment in the workplace. They are well advised to perform that role with vigilance since the determination of when words of discrimination rise to the level of unlawful harassment is not easy to predict.

- (1) 477 U.S. 57 (1986).
 (2) *Id.* at 65, 67.
 (3) 510 U.S. 17, 22 (1993).
 (4) *Id.* at 23.
 (5) See *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 2000).
 (6) *Rizzo-Puccio v. College Auxiliary Services, Inc.*, 2000 U.S. App. LEXIS 14116, at *8 (2d Cir. June 14, 2000).
 (7) *Tomka v. Sella Corp.*, 66 F.3d 1295, 1305 n.5 (2d Cir. 1995).
 (8) *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).
 (9) 180 F.3d 426 (2d Cir. 1999).
 (10) 116 F.3d 625, 633 (2d Cir. 1997).
 (11) 118 F.3d 106, 110 (2d Cir. 1997).
 (12) 52 F. Supp.2d 366, 372 (D. Conn. 1999).
 (13) 990 F. Supp. 285 (S.D.N.Y. 1998).
 (14) 1999 U.S. Dist. LEXIS 1982 (S.D.N.Y. Feb. 26, 1999).
 (15) 88 F. Supp.2d 276 (S.D.N.Y. 2000).
 (16) 54 F. Supp.2d 224, 230 (S.D.N.Y. 1999).
 (17) 2000 WL 307382, at *4 (S.D.N.Y. 2000).
 (18) *Tomka v. Sella Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995).
 (19) 35 F. Supp.2d 272 (E.D.N.Y. 1999).
 (20) 43 F. Supp.2d 407, 415 (S.D.N.Y. 1999).
 (21) 1997 U.S. Dist. LEXIS 10351 (S.D.N.Y. July 16, 1997).
 (22) 2000 U.S. App. LEXIS 14483 (2d Cir. Feb. 17, 2000).
 (23) *Id.* at *34.
 (24) 152 N.J. 490 (1998).
 (25) *Id.* at 503.
 (26) *Id.* at 526 (Internal quotation marks and citations omitted).
 (27) 51 F.3d 591 (5th Cir. 1995).
 (28) *Id.* at 596.
 (29) *Id.*