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ONE AND DONE? THIRD CIRCUIT CLARIFIES THAT EMPLOYEES CAN PROVE A HOSTILE WORK ENVIRONMENT WHEN SUBJECTED TO A SINGLE WORKPLACE SLUR

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Few issues perplex employers more than discovering that a supervisor made an insensitive and possibly offensive remark to one or more employees, particularly to an employee whose performance previously has been noted as subpar. To this mix, add a not unusual delay in bringing that subpar performance to the employee's attention. Has the isolated remark "poisoned the well" hindering the employer from taking adverse action against the employee? Will that single verbal misstep result in an expensive and time-consuming lawsuit if the employer does discipline the employee or takes other adverse action? The standard to analyze these questions recently was clarified by the United States Court of Appeals for the Third Circuit in *Castleberry, et al. v. STI Group, et al., 863 F.3d 259 (3d Cir. 2017)*, a decision the court classified under its rules as "Precedential."

The Legal Standards Governing Hostile Work Environment Cases

To establish a *prima facie* case for hostile work environment under Title VII, a plaintiff must show that (1) he or she suffered intentional discrimination because of a protected characteristic, such as race or age; (2) the discrimination was severe or pervasive; (3) it detrimentally affected the plaintiff; (4) it would have detrimentally affected a reasonable person in like circumstances; and (5) there is a basis for vicarious liability. *Mandel v. M&Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013) (citing *Jensen v. Potter,* 435 F.3d 444, 449 (3d Cir. 2006)); *Ullrich v. United States Sec'y of Veterans Affairs*, 457 Fed.Appx. 132, 140 n.6 (3d Cir. 2012) (citations omitted).

When Does Objectionable Conduct Constitute Harassment?

To prove an allegation of a hostile work environment, the plaintiff must show that an employer's discriminatory conduct was "pervasive" or "severe" enough to negatively "alter the conditions of [the plaintiff's] employment and create an abusive working environment." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002); *Meritor*, 477 U.S. at 67; *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106 (3d Cir. 1994); *Shepherd v. Hunterdon Developmental Ctr.*, 174 N.J. 1, 20 (2002); *Lehmann*, 132 N.J. at 626. "[A] court must consider the totality of 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.'" *Mandel*, 706 F.3d at 168 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

But Certain Objectionable Conduct Does Not Constitute Harassment

The United States Supreme Court has instructed that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'" sufficient to sustain a hostile work environment claim. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, (1998); see *Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 194 (3d Cir. 2015). Thus, "[t]he mere utterance of an epithet, joke, or inappropriate taunt that may cause offense does not sufficiently affect the conditions of employment to implicate ... liability." *Weston v. Pennsylvania*, 251 F.3d 420, 428 (3d Cir. 2001).

The Background of Castleberry v. STI Group

Running through this rather thick forest of legal standards, the Third Circuit decided it was time to blaze a clearly marked trail past its erratic path of conflicting and confusing precedents. The African-American plaintiffs in *Castleberry* were hired by a subcontractor as general laborers and supervised by managers from the subcontractor and the contractor, the other defendant. Shortly after being assigned to a particular worksite, the only other African-American male on the work crew was terminated. Plaintiffs alleged that when they arrived at work on several occasions, they discovered that someone had anonymously written "don't be black on the right of way" on the sign-in sheets. They also asserted that, though they had more pipeline experience than their non-African-American co-workers, they were permitted only to clean around the pipelines rather than work on them. Most importantly, for purposes of our topic, Plaintiffs claimed that, when working on a fence-removal project, a supervisor told one plaintiff and his co-workers that if they had "nigger-rigged" the fence, they would be fired. Seven co-workers confirmed this statement. Plaintiffs reported the offensive language to a superior and were fired two weeks later without explanation. They were rehired shortly thereafter, but terminated again for "lack of work."

The Castleberry Plaintiffs File a Lawsuit

Plaintiffs brought suit in federal district court alleging harassment, discrimination and retaliation in violation of 42 U.S.C. § 1981. In ruling on Defendants' motions to dismiss, the district court dismissed Plaintiffs' harassment claim finding that the alleged facts did not support a finding that the alleged harassment was "pervasive and regular." which the district court deemed a requisite element to state a claim under § 1981. The district court also dismissed Plaintiffs' race discrimination and retaliation claims on other grounds.

The Third Circuit Acknowledges Its Prior Inconsistent Rulings and Clarifies the Legal Standard

The court agreed with Plaintiffs' argument that the district court had applied the wrong legal standard in dismissing their harassment claim when it required them to plead harassment that was "pervasive and regular" and instead, should only have been required to plead the existence of "severe or pervasive." *Castleberry, supra*, 863 F.3dat 263. In reversing the district court, the Third Circuit noted that its prior precedents on this issue were inconsistent.

The court finally clarified that the correct standard to be applied in the Third Circuit is "severe **or** pervasive," using the disjunctive to emphasize that plaintiffs can survive a motion to dismiss a hostile work environment claim where the pleading demonstrates that, if the harassing conduct was sufficiently "severe," the discriminatory conduct need not be "pervasive," or ongoing.

The Clarified Legal Standard Now Supports the Plaintiffs

In *Castleberry*, the parties had disputed whether the supervisor's single use of the "n-word" was adequately "severe" and if one isolated incident was sufficient to state a claim under the clarified standard. On this point, the Third Circuit was clear and precise, stating without equivocation that, "[a]lthough the resolution of that question is context-specific, *it is clear that one such instance can suffice to state a claim." Id.* (emphasis added). Thus, the court found that the supervisor's use of a single, racially charged slur in front of Plaintiffs and their non-African-American co-workers, accompanied by threats of termination, constituted that level of severe conduct that could create a hostile work environment, certainly at this early, pre-discovery stage of the litigation.

Practice Pointer

The need for employers to review and appropriately revise anti-harassment policies, as well as training and educational protocols for both employees and supervisors, including upper-level management officials, has become even more critical following *Castleberry*. Employers need to ensure that employees, supervisors and management are instructed adequately that "locker room talk," resulting in even one isolated offensive comment, can serve as grounds for disciplinary action. We recommend that all employers have their anti-harassment policies and training protocols reviewed by counsel to determine their sufficiency in view of the recently clarified "severe or pervasive" standard. Moreover, where it is determined that an offensive epithet was used to demean an employee, we recommend that employers review all the facts with their counsel prior to taking any adverse employment action against that employee. In this area, moving too quickly down the trail can result in a company being lost in a forest of litigation.
