Fourth Circuit Sets Employee-Friendly Standard for Title VII Retaliation Claims

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A former waitress's hostile work environment and retaliation claims under Title VII of the Civil Rights Act against the employer should go to a jury, the Richmond-based federal appellate court has ruled in a decision that sets a more employee-friendly standard for such claims. *Boyer-Liberto v. Fontainebleau Corp.*, No. 13-1473 (4th Cir. May 7, 2015) (en banc). The Court overruled precedent in the circuit by finding a single incident can be severe enough to trigger Title VII's protection.

The *en banc* Court, 12-3, vacated a May 2014 panel decision granting summary judgment for the employer. The Fourth Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

Background

In 2012, Reya Boyer-Liberto, an African-American former cocktail waitress at Ocean City's Clarion Resort Fontainebleau Hotel filed suit in the U.S. District Court for the District of Maryland alleging racial hostile work environment and retaliation claims under both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. She alleged that within a single 24-hour period in September 2010, a white coworker twice called her a "porch monkey" and her job was threatened after she complained.

In 2014, the District Court granted summary judgment to the employer. On appeal, a Fourth Circuit panel affirmed, holding that although "[t]he 'porch monkey' term…was indeed racially derogatory and highly offensive," the coworker's use of that term twice in a period of two days in discussions about a single incident "was not, as a matter of law, so severe or pervasive…so as to be legally discriminatory."

The panel's decision was vacated by the grant of rehearing by the full appellate court.

Change in Precedent

The entire Court vacated that panel's decision, making it clear that its opinion "underscore[s] the Supreme Court's pronouncement…that an isolated incident of harassment, if extremely serious, can create a hostile work environment." The Court also held that an employee is protected from retaliation "when she reports an isolated incident of harassment that is physically threatening or humiliating, even if a hostile work environment is not engendered by that incident alone."

The decision also overturns the Circuit's 2006 ruling in *Jordan v. Alternative Resources Corp.* There, in a case related to comments in the wake of the D.C. snipers' capture in 2002, the Fourth Circuit affirmed dismissal of a hostile work environment claim holding that an offensive comment "was a singular and isolated exclamation" that did not alter the terms and conditions of Jordan's employment. To be protected conduct, it found that a plaintiff would have to "describe a workplace permeated by racism, by threats of violence, by improper interference with work, or by conduct resulting in psychological harm."

Since then, *Jordan* has controlled in the Fourth Circuit. Not anymore. The Court stated explicitly in *Boyer-Liberto*, "to the extent today's decision is in conflict with *Jordan v. Alternative Resources Corp.*, 458 F. 3d 332 (4th Cir. 2006), *Jordan* is hereby overruled."

Implications

In his dissent, Judge Paul Niemeyer predicted that the holding would "generate widespread litigation over the many offensive workplace comments made everyday that employees find to be humiliating."

Although it is unlikely that this decision will cause a stampede to the courthouse, employees (or their counsel) may raise claims of retaliation in their discrimination complaints more often than they might have previously. This relaxed standard means that arguments that offensive, yet isolated, conduct is neither severe nor pervasive enough to establish discrimination are no longer as strong. It also brings a higher likelihood that retaliation claims will survive summary judgment and, therefore, proceed to trial

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(and a jury).

Whether this means more cases will go to trial is uncertain, but when the likelihood of summary judgment goes down, the costs of litigation (and, by extension, potential settlement) certainly go up.

Jackson Lewis attorneys are available to answer questions about this or other workplace developments.