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Seventh Circuit Court of Appeals Offers Guidance on Evaluating Whether Racial Harassment is Severe or Pervasive

An employee claiming that he or she worked in an actionably hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, must show that "(1) he was subject to unwelcome harassment; (2) the harassment was based on race (or another protected category); (3) the harassment was severe or pervasive to a degree the altered the conditions of employment and created a hostile or abusive work environment; and (4) there is a basis for employer liability." *Robinson v. Perales*, 894 F.3d 818, 828 (7th Cir. 2018). To evaluate the third element, courts look at "the severity of the alleged conduct, its frequency, whether it [wa]s physically threatening or humiliating (or merely offensive), and whether it unreasonably interfere[d] with the employee's work performance." *Robinson*, 894 F.3d at 828. The Seventh Circuit offered additional guidance on what conduct rises to the level to establish a severe or pervasive hostile work environment in *Gates v. Board of Education of the City of Chicago*, No. 17-3143, 2019 WL 698000 (7th Cir. Feb. 20, 2019).

Gates, an African-American male in his early fifties, worked for the Chicago Board of Education as a building engineer for eleven years prior to filing suit against the Board claiming, among other things, that he worked in a racially hostile work environment. *Gates*, 2019 WL 698000, at *1. Beginning in 2012, Gates reported to Rafael Rivera, a facilities engineer who oversaw engineering work at sixteen schools, including the school where Gates worked. *Id.* Gates and Rivera saw each other in person only three times or so per month. *Id.* In his original complaint, Gates's only allegation of a hostile work environment caused by Rivera related to his race was a claim that in November 2013, Rivera "started yelling and pointing his finger in [Gates's] face. He told [Gates] that 'you will kiss the principal's ass to make her happy' or he would write [Gates] up, which would cause [Gates] to get low work evaluations and get fired." Complaint, Count II at ¶ 14, available at https://ecf.ilnd.uscourts.gov/doc1/067115363839. In his answers to written interrogatories, Gates did not identify any racial comments made by Rivera, but in his deposition he alleged for the first time that Rivera uttered racial epithets against him, including referring to him by the N-word on two occasions and threatened to write Gates's "black ass up." *Gates*, 2019 WL 698000, at *2-3.

While the district court considered the new allegations that came out in the deposition in ruling on the Board's motion for summary judgment, the district court ultimately granted the Board's motion, finding that Gates did not establish that he was subject to a hostile work environment. *Id.* at *4. In making this determination, the district court stated that "the threshold for plaintiffs is high, as '[t]he workplace that is actionable is one that is 'hellish.'" *Id.* When analyzing whether the work environment was severe or pervasively hostile to Gates due to his race, the district court cited a number of decisions where use of racial epithets were deemed insufficient to establish a hostile work environment. *Id.* at *5.

The Seventh Circuit reversed, finding that the district court did not apply the appropriate standards in deciding the motion. Initially, the court reiterated that since *Jackson v. County of Racine*, 474 F.3d 493, 500 (7th Cir. 2007), a plaintiff need not establish that the workplace was "hellish" in order to constitute a hostile work environment. *Id.* at *4-5. Gates

had identified three key racially-tinged incidents: (1) a joke in which Rivera called Gates the N-word; (2) a meeting in which Rivera threatened to write up Gates's "black ass"; and (3) a comment by Rivera in which he addressed Gates using the N-word. *Id.* at *5. Although the district court did not believe one or two utterances of the N-word were severe or pervasive enough to rise to the level of establishing liability absent an unusually severe, physically threatening, or humiliating incident, the Seventh Circuit described the district court's analysis as "flawed . . .because it overlooked the fact that in most of the cases it cited rejecting hostile work environment claims, a *co-worker* as opposed to a *supervisor* uttered the racially offensive language." *Id.* (emphasis in original). The Seventh Circuit noted that it has "repeatedly treated a supervisor's use of racially toxic language in the workplace as much more serious than a co-worker's. . . . This is particularly true when supervisors address these derogatory and humiliating remarks directly to the employees in question." *Id.* at *6.

The Seventh Circuit's opinion placed the cases relied on by the district court in three distinct categories of generally non-actionable behavior that are useful for practitioners analyzing the likelihood of success of a Rule 56 motion in a hostile work environment case. In the first category, "the alleged actions or comments were comparably horrific to using the N-word but were done or said by a co-worker, not a supervisor." *Id. See Nichols v. Michigan City Plant Planning Dep't*, 755 F.3d 594, 601 (7th Cir. 2014) (co-worker using racial epithet); *Ford v. Minteq Shapes & Servs., Inc*., 587 F.3d 845, 846-48 (7th Cir. 2009) (co-worker's comments referring to plaintiff Ford as "black man" and "black African-American").

In the second category, "the actions or comments alleged were made by a supervisor but were more ambiguous or significantly less offensive than addressing an employee with the N-word." *Gates*, 2019 WL 698000, at *6. *See McPherson v. City of Waukegan*, 379 F.3d 430, 434-35, 439 (7th Cir. 2004) (asking sexually-suggestive questions about undergarments alone not enough to establish hostile work environment); *North v. Madison Area Ass'n for Retarded Citizens-Developmental Centers Corp.*, 844 F.2d 401, 409 (7th Cir. 1988) (a few possibly racial statements were insufficient to establish pervasive atmosphere of racial harassment); *Poullard v. McDonald*, 829 F.3d 844, 858-59 (7th Cir. 2016) (mild and ambiguous comments by supervisor and incidents that are arguably connected to race did not establish actionable hostile work environment).

The third category involves situations where "the alleged remarks were very offensive and made by a supervisor but were not spoken directly to the plaintiff. *Gates*, 2019 WL 698000 at *6. *See Patt v. Family Health Systems, Inc.*, 280 F.3d 749, 751, 754 (7th Cir. 2002) (surgery department chief's eight gender-based comments with only two made directly to plaintiff and neither referred to her specifically was not actionable hostile work environment); *Whittaker v. Northern Illinois Univ.*, 424 F.3d 640, 644-45 (7th Cir. 2005) (plaintiff did not establish actionable hostile work environment since gender-based comments were made outside her presence and the evidence did not establish that she was aware of the remarks during her employment). The court also identified a fourth category of cases improperly relied on by the district court: where "the conduct or remarks were evaluated under the now-rejected 'hellish' standard." *Gates*, 2019 WL 698000 at *6.

Practical Take Away

The *Gates* case is yet another reminder that courts hold supervisors in the workplace to a higher standard than a plaintiff's co-workers. Employers must ensure that supervisors recognize their heightened responsibility to ensure that

they do not utter remarks that show hostility towards an employee's protected status. Supervisors must also take prompt action to prevent and eliminate harassment in the workplace.

About the Author

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