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HOSTILE WORK ENVIRONMENT

No kidding: 10th Circuit sends case involving racial jokes to trial

by Lance Rich

> *Q: What's red, white, and blue but not something you hoist up a flagpole?*
>
> *A: An employer red with rage, white with fright, and blue in the face while holding its breath waiting for a jury verdict in a discrimination case. (Da-dum-dum-ching!)*

If you think that joke is bad and offensive, just wait; there's more to come. In the following case, supervisors' off-color attempts at humor didn't sit well with a disgruntled former employee who filed suit. Nor did they sit well with the U.S. 10th Circuit Court of Appeals (whose rulings apply to all Utah and Colorado employers), which overturned the federal district court's decision to dismiss the case without a trial. Read on to find out why the 10th Circuit thought the Hispanic former employee's hostile work environment and constructive discharge claims under Title VII of the Civil Rights Act of 1964 were serious matters that should be heard by a jury.

A comedy of errors

Teresa Hernandez worked in food services at Valley View Hospital in Glenwood Springs, Colorado. Hernandez, who is a Latina of Mexican origin, alleges that her supervisors, Marc Lillis and Nicholas Stillahn, frequently subjected her to racially derogatory comments about Latinos. Since this was before the trial court ruled on the hospital's motion to dismiss the claims before trial, the allegations were not yet proven as facts, but they did have to be considered true by the trial judge when ruling on the motion. Although Hernandez is unable to recall the exact dates that some of the jokes were told, she accuses her supervisors of telling the following offensive jokes at least three or four times each:

> Q: Do you know why Mexicans don't barbecue?
>
> A: Because the beans go through the grill. (Da-dum-dum-ching!)
>
> Q: Do you know why Mexicans and Latinos make tamales for Christmas?
>
> A: So they can have something to unwrap. (Da-dum-dum-ching!)

Hernandez repeatedly complained to Lillis and Stillahn that the jokes were racist and inappropriate. She claims she told Lillis the following joke, although it's unclear whether Lillis actually heard it or whether it was directed only at a black cook:

> Q: Do you know why blacks and Latinos never get married?
>
> A: Well, blacks are lazy, and Latinos steal. So if they got married, a black Latino would be too lazy to steal.

Hernandez alleges that one day, Lillis repeatedly asked her whenever she walked by if an accused murderer who was in the news and shares her last name was her son or brother. She told Lillis that she wasn't related to the murderer and that just because her name is Hernandez and she is Latina doesn't mean her son or brother is a murderer. She also told him that his chiding was racist and upsetting. On another occasion, she claims he laughed at her son's prom photo and said that only a Latino would wear tennis shoes to a prom.

When Hernandez's family joined her for lunch one day, Stillahn asked her if they had paid for their meals. When she said they had, he challenged her because he hadn't seen her at the register. According to Hernandez, whenever Stillahn saw a Latino worker get a drink, he would ask if he had paid for it. However, he never asked that of a non-Latino worker. He also chastised a Latino worker for wearing shoes that didn't meet the company's dress requirements but said nothing to a white employee who did the same.

One day, Stillahn yelled at Hernandez about the state of the cafeteria. Hernandez responded, "Well, maybe I'm not white enough." Stillahn became even more upset, pushed a cart, and kicked a door. When Hernandez confirmed to Lillis that she had made the remark, he sent her home.

That same afternoon, Valley View's HR coordinator, Nikki Norton, told Hernandez she was being suspended for making the "not white enough" comment. Hernandez asked why she was being suspended for her comment when a non-Latino coworker wasn't disciplined for making a remark Hernandez complained was racist and offensive to Mexicans.

Norton sent an e-mail to Valley View's HR director, Daniel Biggs, stating that Lillis and others wanted Hernandez fired because they "didn't want that type of person working here." She also told Biggs that she agreed that Hernandez should be fired but that Lillis first had to "get his ducks in a row" and write Hernandez up for job performance issues.

Hernandez met with Lillis and Biggs and asked to be reassigned to any position other than food services because she didn't feel safe working in the kitchen given how angry Stillahn had acted toward her. Biggs denied her transfer request but offered her Family and Medical Leave Act (FMLA) leave, which she accepted. He met with her a few days before her leave expired to discuss performance concerns that Hernandez claims were never formally documented. She again requested a transfer to another position, but Biggs denied her request. When Hernandez failed to return to work after her FMLA leave expired, Biggs fired her.

Derogatory comments don't have to be directed at the victim to create a hostile work environment.

District court finds supervisors' comments boorish but not illegal

Hernandez later sued Valley View in the federal district court in Colorado. She filed claims of constructive discharge and race and national origin discrimination based on a hostile work environment in violation of Title VII. The district court found that she presented evidence of only a handful of racially insensitive jokes and comments that spanned a period of more than three years. Thus, the court concluded that while such conduct may be boorish, infantile, and unprofessional, it didn't amount to a hostile work environment under Title VII.

The district court also noted that Hernandez provided few specifics to support her allegations of insensitive jokes and disparate treatment and that it was unclear whether the jokes and comments were directed at her personally. As a result, it dismissed all her claims without a trial. Hernandez appealed the decision to the 10th Circuit.

Court finds hostile work environment claim no laughing matter

The 10th Circuit took a no-nonsense approach to Hernandez's hostile work environment claim. Under Title VII, it is unlawful to discriminate against an employee based on her national origin. That extends to conditions in the workplace that render it a hostile work environment. However, because Title VII doesn't establish a general civility code for the workplace, run-of-the-mill boorish, juvenile, or annoying behavior isn't actionable. To reach trial on a claim alleging a racially hostile work environment, an employee must show (1) that the workplace is permeated with discriminatory intimidation, ridicule, and insult (2) that is sufficiently severe or pervasive to alter the conditions of the victim's employment and (3) creates an abusive working environment.

Courts examine factors such as the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work environment. The court must determine whether the environment was both subjectively offensive (the employee was offended) and objectively offensive (a reasonable person likewise would be offended).

In examining the evidence in a light most favorable to Hernandez, the court concluded that a jury could reasonably find that the elements of a hostile work environment claim had been satisfied. It noted that Hernandez's supervisors had repeatedly subjected her to racially insensitive and offensive comments and jokes and that she had promptly and frequently complained to them and others that she was offended.

The court noted that Hernandez presented evidence of no fewer than 14 offensive comments and jokes over the 14 months that Lillis had supervised her, which, considering the broader context, was sufficient. Although she wasn't able to give the precise dates that the comments were made, she presented specific examples of her supervisors' racial jokes, identified general time frames, and provided the relevant content and context of the comments.

Valley View argued that the allegations were insufficient to establish a hostile work environment because many of the alleged comments weren't directed at Hernandez, but the court disagreed, stating that most of the comments were directed at her individually or as a member of the Latino community. Even if they weren't, the court stated that derogatory comments don't have to be directed at or intended to be received by the victim to create a hostile work environment. So long as the

employer knew about the offending behavior, it can be considered. Thus, the court concluded that Hernandez is entitled to present her hostile work environment claim to a jury.

Court takes similar straight-faced approach to constructive discharge claim

The court reached a similar conclusion on Hernandez's constructive discharge claim. She claimed she was constructively discharged as a result of the hostile work environment, which culminated in working conditions so unreasonable that she couldn't return to the food services department following her FMLA leave. To prevail on her claim, she had to show that the working conditions were so intolerable that a reasonable person would have felt compelled to resign. Hernandez based her constructive discharge claim against Valley View on the following:

(1) Its refusal to transfer her to a position outside the food services department;

(2) Its decision to fire her the same day she reported discrimination based on performance issues that were undocumented at the time;

(3) Her placement on unpaid leave when she didn't return to work the day after her suspension;

(4) The fact that she was prevented from returning to work until she attended a meeting that was held 10 days after her suspension ended; and

(5) The fact that at the end of her FMLA leave, she was presented with new, after-the-fact performance criticisms.

The 10th Circuit noted that the district court had dismissed Hernandez's constructive discharge claim by reasoning that she couldn't satisfy the more onerous burden of proving a constructive discharge claim if she hadn't produced sufficient evidence of a hostile work environment. Because the district court based its dismissal of her constructive discharge claim on its erroneous conclusion that she hadn't shown enough evidence for a trial on her hostile work environment claim, the appellate court determined that the district court had to reconsider its decision. *Hernandez v. Valley View Hospital Association*, 2012 WL 2384265 (10th Cir., June 26, 2012).

The punch line

The potential consequences of a hostile work environment claim should take any humor out of a racially offensive joke or remark. Instead of hearing the "da-dum-dum-ching!" of the drums following the clearly inappropriate jokes in this case, employers should condition themselves to hear "dumb-dumb-cha-ching," which is the sound of money leaving their cash registers at the conclusion of a lawsuit for allowing racial discourse in the workplace.

Whenever an employee complains about improper and offensive jokes or comments, an employer must take reasonable measures to stop the remarks. If it does not, the joke will be on the employer, and the punch line may come as a punch to the gut in the form of a jury trial on a disgruntled employee's discrimination claim. Da-dum-dum-ching! Remember, judges and juries are tough audiences, and there isn't much they'll find funny when offensive jokes and comments are repeated in open court. ✤