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STICKS AND STONES MAY BREAK MY BONES, BUT WORDS SURVIVE DISMISSAL: *CASTLEBERRY V. STI GROUP*

By Anna Ferrari

The Third Circuit has recently taken steps to resolve inconsistent precedent regarding the standard for pleading hostile work environment harassment. In *Castleberry v. STI Group*, decided in July, the Third Circuit held for the first time that a single, isolated offensive comment could give rise to liability for harassment.[1] Although Supreme Court precedent has long provided for the possibility that a lone incident can give rise to a harassment claim, in practice, employers have been able to defend these claims with success on the basis that isolated actions are rarely, if ever, severe enough to alter the conditions of employment. *Castleberry* reminds employers that harassment claims based on single statements should not be presumed insignificant; instead, they should be evaluated in their full factual context.

Sidebar:

MORRISON FOERSTER

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BACKGROUND

In *Castleberry*, two African-American laborers filed a complaint alleging race-based discrimination against the staffing agency that employed them (STI Group) and the client company where they worked (Chesapeake Energy Corporation). The laborers alleged that, despite their prior experience working on pipelines, they were only permitted to clean the pipelines at the worksite rather than work on them directly. On several occasions, someone had anonymously written "don't be black on the right of way" on the sign-in sheet at their worksite. Later, while plaintiffs were working on a fence-removal project, a supervisor told plaintiff Atron Castleberry that he and his co-workers would be terminated if they "n—-rigged the fence." This incident was apparently confirmed by seven co-workers.[2]

Following the incident at the fence-removal project site, Mr. Castleberry and his co-plaintiff, John Brown, allegedly reported the supervisor's offensive language to a superior at STI, the staffing agency. Two weeks later, Chesapeake terminated both plaintiffs without explanation. Chesapeake rehired the plaintiffs "[s]hortly thereafter" based on its apparent recognition that their termination was unlawful but then terminated both for a second time within a month, supposedly for "lack of work."[3]

The plaintiffs filed complaints alleging discriminatory termination, retaliation, and racial harassment. The district court for the Middle District of Pennsylvania dismissed the complaint, finding that (1) the plaintiffs had not alleged with sufficient specificity that their termination was motivated by the plaintiff's complaint of race-based harassment and (2) "the facts pled did not support a finding that the alleged harassment was 'pervasive and regular'" because the plaintiffs principally based their harassment claim on a stray comment.[4]

The Third Circuit substantially reversed the district court decision in an opinion that clarifies the standard of pleading and proving hostile workplace harassment claims based on isolated incidents.

ANALYSIS

Ever since the Supreme Court determined in *Meritor Savings Bank v. Vinson* that actionable harassment "must be sufficiently severe or pervasive to alter the conditions of the victim's employment" and create an abusive working environment,[5] the question of what meets this standard has ultimately been a judgment call for trial courts. Since *Meritor*, courts in the Third Circuit have not been consistent in their application of the "sufficiently severe or pervasive" standard. As the Third Circuit in *Castleberry* noted, its courts have articulated at least three different standards since *Meritor*: severe *or* pervasive, severe *and* pervasive, and pervasive *and* regular. In reversing, the Third Circuit directed the district court to apply the severe or pervasive standard, in keeping with *Meritor*.

Having clarified this standard, the Third Circuit considered whether the supervisor's single use of the "n-word" was sufficiently "severe" to state a claim. The Court of Appeals held that this isolated incident could suffice to state a claim. To hold otherwise, opined the Court, would "miss the point" of precedent holding that harassment need not occur with regularity to be actionable.[6]

This holding resonates beyond the Third Circuit. Although Supreme Court precedent leaves open the possibility that a single incident can be severe enough to give rise to an actionable claim, even the Supreme Court has expressed skepticism that it ultimately would—"A recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"[7] For example, in *Clark County School District v. Breeden*, in a per curiam opinion, the Supreme Court found that "no reasonable person" could be offended by a supervisor's sexual innuendo in the presence of a subordinate.[8]

The result in *Castleberry* owes much to the fact the district court disposed of the plaintiffs' claims via a motion to dismiss. Even though there is a high bar for proving harassment based on a single comment, it was improper for the district court to conclude that there could be no possibility of a valid claim, bypassing any factual inquiry into what is an inherently fact intensive issue. (By comparison, *Breeden* reached the Supreme Court on review of the Ninth Circuit's reversal of a summary judgment ruling.) The Third Circuit also appears to have found persuasive the fact that the supervisor's offensive remark allegedly included a threat of termination, which, if true, would have augmented the severity of the plaintiff's experience.

WHAT THIS MEANS FOR EMPLOYERS

Castleberry exemplifies a broader shift away from the perspective that stray or singular remarks cannot amount to actionable harassment as a matter of law. It also provides a valuable reminder to employers investigating complaints of workplace harassment not to downplay or dismiss stray comments as aberrational or lacking in discriminatory intent. Even complaints based on isolated remarks should be evaluated carefully and with full appreciation for the context in which the remarks were made, with an eye toward determining

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whether the conditions of employment could have been changed as a result of the comment. Otherwise, the zero-tolerance standard trumpeted by so many anti-harassment policies will be rendered meaningless.

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To view prior issues of the ELC, click here.

1 863 F.3d 259 (3d Cir. 2017).

2 *Id.* at 22.

3 *Id.*

4 *Id.*

5 477 U.S. 57, 67 (1986) (emphasis added); *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citing Meritor); *Pennsylvania State Police v. Suders*, 542 U.S., 129, 133, 147 (2004) (same).

6 863 F.3d at 264.

7 *Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998).

8 532 U.S. 268, 271 (2001).

Form I-9 Has Been Revised (Again)

Employers should take note that the Form I-9 (Employment Eligibility Verification) and its accompanying instructions have been subject to minor revisions by U.S. Citizenship and Immigration Services for the second time in the past year. The current version of the form, which bears a notation showing a last revision date of "07/17/17 N," is required to be in use by September 18, 2017.

New California Notice Regarding Rights of Victims of Domestic Violence, Sexual Assault, and Stalking

As noted in our Legislative Roundup Commentary last October, the passage of AB 2337 introduced a requirement that California employers with 25 or more employees provide notice at the time of hire (and to existing employees, upon request) of certain workplace protections for victims of domestic violence, sexual assault, or stalking. The Department of Labor Standards Enforcement has promulgated a form of notice for this purpose. Employers should update their materials for new hires to include this disclosure.