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Has the Second Circuit Lowered the Bar for Plaintiffs to Advance a Hostile Work Environment Claim under Title VII?

In a pair of recent decisions that may spur even more litigation for employers, the Second Circuit Court of Appeals reversed summary judgment dismissing hostile work environment claims under Title VII. *Daniel v. T&M Protection Resources, LLC*, 15-cv-560; *Ahmed v. Astoria Bank*, 16-cv-1389. In *Daniel*, the Court raised substantial doubts about long-established authorities when it ruled that even a single racial slur, if "sufficiently severe," may be enough to create a hostile work environment under Title VII. In *Ahmed*, the Court ruled that "several" allegedly demeaning comments were sufficient to defeat summary judgment. After *Daniel* and *Ahmed*, employers may find that the already-high hurdle to obtain summary judgment dismissing hostile work environment claims under Title VII has been elevated even further.

Daniel claimed that his supervisor, on one occasion, called him "you f------ n-----." In reversing summary judgment for the employer, the Second Circuit acknowledged that its prior jurisprudence instructed that to create a hostile work environment, "there must be a steady barrage of opprobrious racial comments." Yet, the Court reasoned that this did not foreclose the possibility that a single slur could be enough. The Second Circuit made little effort to explain how the district court misconstrued precedent requiring "a *steady barrage* of opprobrious racial *comments*" in the plural. Instead, in evaluating the severity of the one-time slur at issue, the Court asserted that "'perhaps *no single act* can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet . . . by a supervisor in the presence of his subordinates.'"

Ahmed claimed that she suffered a hostile work environment as an Egyptian and Muslim. At deposition, she "testified to only two instances" where her supervisor made comments about her hijab. However, she was permitted to amplify this testimony through a sworn affirmation submitted in opposition to summary judgment. Thus, citing evidence that her supervisors "demeaned [her] race, ethnicity, and religion '[o]n *several occasions*,'" the Second Circuit reversed summary judgment.

Notably, neither *Daniel* nor *Ahmed* addressed the level of authority required for a supervisor's one-time comment to impose liability on the employer, nor the availability of the *Farragher/Ellerth* defense, *i.e.*, whether an employer who takes prompt remedial action can defeat liability notwithstanding the supervisor's remark(s). What does seem clear, however, is that "a steady barrage" of multiple slurs may no longer be required for a plaintiff to advance a hostile work environment claim to trial.

Daniel and *Ahmed* provide a stark reminder that employers face an increasingly uphill battle in seeking summary judgment. It is important for employers to continue to vigorously reinforce in anti-harassment training that all employees, particularly supervisors, must be vigilant about the words they use in the workplace – and those to avoid. All alleged utterances that violate company policy (even if made only once) should be promptly investigated and the rules prohibiting the use of words and phrases that could be considered discriminatory or insensitive should be enforced. Such utterances may also form the basis for swift discipline, including the possibility of immediate termination of the offending employee.

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