

# Workplace Language and Hostile Environment Claims

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It is one of the nightmare scenarios for any HR Department or in-house employment counsel: A white employee directing crude, vicious, racially charged slurs at a coworker of color. Perhaps the most inflammatory of such racial epithets is so toxic that it is typically no longer even spelled out in judicial opinions; it is simply the “n-word.” But employees do not limit themselves to that word, and courts end up assessing a range of offensive statements. ***So, when does offensive language in the workplace create a viable hostile environment claim?***

From an HR perspective, insulting epithets, particularly based on race, gender, or other protected classes, are hurtful, damaging to employee morale, and prohibited by company policies.

From a legal standpoint, however, the impact of such statements is more difficult to assess. Although it is beyond obvious that no one should ever refer to a co-worker in racial terms, the legal framework of “hostile atmosphere” claims requires an analysis of factors including the following:

- What actually was said?
- Who said it, and under what circumstances?
- How often were offensive remarks made in the workplace?
- How did the company respond upon learning about the problem?

If the employer can demonstrate that the language, even if offensive, was not “severe and pervasive,” and that the company responded appropriately to employee complaints, the employer has an excellent chance to prevail against claims by the employee. Three recent decisions help illustrate this legal landscape:

In *Barbara v. Here North America, LLC*, the plaintiff employee was subjected to a supervisor’s use of the “n-word,” in addition to “other racially-charged language,” a sign reading “Colored” being hung above the plaintiff’s work station, and an ineffective response from management. Not surprisingly, the employee successfully staved off the

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employer's motion for summary judgment, even though there were statute of limitations problems with some of the claims.

The court applied the following legal standard for a hostile environment claim: (1) unwelcome conduct or comments; (2) harassment based on race (or other protected category); and (3) the harassment was "sufficiently severe or pervasive" so as to "alter the conditions of employment and create an abusive working environment."

The court found that the conduct described above met the severe and pervasive standard and entitled the employee to a full trial of her claims. The employee was also entitled to proceed with claims that the damaging atmosphere impacted his performance, leading to his termination, and that the termination was a form of retaliation for his complaints about the racially hostile atmosphere.

By contrast, the employer prevailed, at least in part, in *Paul v. Saltzman, Tanis, Pittel, Levin & Jacobson, Inc.* Paul was a certified medical assistant whose Spanish co-workers referred to her as the "black monkey girl." The employer, upon being informed of the situation, advised Paul to simply "let it go." When she continued to complain, she was eventually terminated, in part because of her refusal to "let it go."

Paul sued for both hostile environment and retaliatory discharge. The court noted that the determination of whether a hostile workplace atmosphere is sufficiently severe and pervasive is not "a mathematically precise test," and that no single factor decides the question. The court found that the "few isolated instances" of offensive behavior here did not meet the test and dismissed the hostile atmosphere claim. However, the court did allow Paul the opportunity to amend her complaint, potentially reviving the hostile atmosphere case if she was able to provide more facts showing severe and pervasive harassment.

The court also advanced the retaliatory discharge claim. Given that one reason given by the employer for the discharge was the employee's refusal to drop a complaint of racial harassment (based on a highly offensive epithet), it is certainly no surprise that the retaliatory discharge claim had sufficient merit to proceed.

Finally, in *Yeboah-Kankam v. Prince William County School Board*, plaintiff's claims failed, in part because plaintiff had a lengthy and well-documented record of his own inappropriate conduct, and because the hostile atmosphere claim was based, in part, on the fact that a school district representative had referred to him as a "confident, African American male." The court pointed out that this was not even offensive language and could not support the claim.

The takeaways from these recent cases include:

- Offensive language is not only wrong; it is potentially the basis for a valid lawsuit. It should be prohibited by company policies and certainly never used by supervisors or management;
- Not every complaint identifies what courts will agree is offensive language;

- If instances of offensive conduct do arise, the company must assess how bad they are, how often they occurred, and how best to correct the problem. An aggressive and effective company response that makes it clear offensive statements are not tolerated is most often the best defense;
- By contrast, attempts to sweep the problem under the rug only make it worse: Telling a complaining employee to “let it go” is a terrible idea, and firing her for failing to drop her complaint is even worse.

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