

Fourth Circuit Refines Analysis of Retaliation for Reporting Isolated Incidents of Harassment

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Take Away: The Fourth Circuit, en banc, has drawn a clear(er) line by which to determine when an employee's complaint of an isolated incident of harassment is protected from retaliation, holding that an employee will have an objectively reasonable belief that a hostile working environment is occurring if the harassment is physically threatening or humiliating. Reporting an isolated incident of harassment which meets this standard will constitute engaging in a protected activity and entitle the employee to protection from retaliation.

Overview: In *Boyer-Liberto v. Fontainebleau Corporation*, the Court of Appeals for the Fourth Circuit, faced the question of whether an African-American plaintiff's complaint, which alleged she had twice in a span of 24 hours been called a "porch monkey" and had been terminated shortly after reporting the harassment, could survive summary judgment. In at least one of the cases, the alleged supervisor was so close to the plaintiff and so animated that her saliva landed on the plaintiff. The district court had granted summary judgment to her employer, and a split panel of the Fourth Circuit had affirmed that decision, which in most instances would end the case. In an unusual twist, the Fourth Circuit decided that all of its judges should have an opportunity to hear the case and review what the small panel of judges decided. The Fourth Circuit's decision to rehear the case en banc – that is, before all of the active Circuit judges – vacated the split panel decision (effectively overruling itself) and sent the case back to the trial court to continue the case. The question the Court sought to answer was whether the isolated "porch monkey" comments, taken in context (spit and all), were sufficiently severe or pervasive to create an objectively reasonable belief that a hostile working environment was occurring, such that the employee's report of the isolated comments was afforded protection from retaliation.

In the 54 page majority opinion, the Court examined its own precedent and the controlling Supreme Court case law. As a result of this analysis, the Court expressly rejected its previous holding that an employee who reports an isolated incident of harassment insufficient to create a hostile work environment cannot have possessed a reasonable belief that a Title VII violation was occurring or was likely to occur. The Court then asked: "What is the proper standard for determining whether an employee who reports an isolated incident of harassment has a reasonable belief that she is opposing a hostile working environment in progress?" The answer provided by the Court turns on the severity of the harassment.

The Court reaffirmed that "simple teasing" or "an offhand comment" is generally not sufficient to create a hostile working environment without significant repetition or an escalation in the harassment's severity. But, declared the Court,

"an employee will have a reasonable belief that a hostile working environment is occurring based on an isolated incident if that harassment is physically threatening or humiliating."

Under the facts of the case, the Court further held that the term "porch monkey" is degrading and humiliating in the extreme. The plaintiff's reporting of it was therefore protected from retaliation.

Remaining Uncertainty: The Fourth Circuit's decision attempts to develop a bright line rule for when statutory anti-retaliation provisions are triggered in hostile working environment situations. To an extent, the Court's analysis does so, but it leaves unanswered the narrower questions of what conduct is considered humiliating, as opposed to offensive, and how the determination of a physical threat is made (e.g., are implicit threats sufficient? What type of physical threat? Is there a likelihood calculus?). There will undoubtedly be further litigation on these issues. In the meantime, employers should make sure that supervisory and management employees understand that employees who report an isolated instance of harassment which is humiliating or physically threatening are likely protected from retaliation, even if the isolated incident is ultimately insufficient to establish a hostile working environment.