Never Okay

A single instance of the N-word in California workplaces may be enough to sustain an HWE claim

By Bryan Schwartz and Matthew Junker

"[I]n my view, being called the n-word by a supervisor . . . suffices by itself to establish a racially hostile work environment [under Title VII] . . . No other word in the English language so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African-Americans."

— Brett Kavanaugh
Current nominee to the U.S. Supreme Court, concurring in *Ayissi-Etoh v. Fannie Mae* (D.C. Cir. 2013) 712 F.3d 572.

Judge Kavanaugh is hardly the paragon of civil rights enforcement, but he is right on this. The N-word, like no other, evokes the horrific history of black enslavement, and employers have an ongoing responsibility to prevent its use in workplaces. Plaintiffs' lawyers must hold employers accountable when they fail. Because of the epithet's role in the long history of anti-black oppression, courts should find a single use of the N-word instantly creates a hostile work environment (HWE) actionable under Title VII of the Civil Rights Act of 1964 and the California Fair Employment and Housing Act (FEHA). A supervisor's use of the N-word should lead to strict liability for the employer, and a non-supervisory employee's use of the N-word should lead to liability if the employer fails to take effective, immediate, and appropriate corrective action.

The persistence of anti-black discrimination

Courts are mandated to construe Title VII and the FEHA liberally to combat racial discrimination. (See *Silver v. KCA, Inc*. (9th Cir. 1978) 586 F.2d 138, 141; *Brown v. Superior Court* (1984) 37 Cal.3d 477, 486.) Yet despite these statutes being in effect for more than forty years, African-American households own just one-tenth of white American households' per capita wealth[1] and the nation is experiencing a resurgence of organized white supremacists.[2] This racial stratification depends not only on violence, but also on racist ideology, and racist insults play a central role. As the California Courts of Appeal have explained, a racist insult "injures the dignity and self-regard of the person to whom it is addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status, and personhood." (*Lee v. Superior Court* (1992) 9 Cal.App.4th 510, 516 (citation omitted).)

Throughout American history, black oppression has been justified by the portrayal of African-Americans as lazy, ignorant, and lacking the refinement necessary for upward social mobility. No other word so powerfully propagates this racist caricature than "nigger." Courts must take use of the N-word in workplaces seriously if we are to reverse the long-established economic order that traps African-Americans as a permanent underclass, for "[n]ot only does the listener learn and internalize the messages contained in racial insults," but "these messages color our society's institutions and are transmitted to succeeding generations." (*Id.* at 516-17 (citation omitted).)

Use of the N-word at work is severe, creating a hostile work environment

HWE claims under Title VII and the FEHA are an important tool for ending racist verbal harassment in the workplace. To constitute an HWE, harassment must be "sufficiently severe or pervasive to alter the conditions of [the plaintiff's] employment and create an abusive work environment." (*Manatt v. Bank of Am., NA*, 339 F.3d 792, 798 (9th Cir. 2003); *Lyle v. Warner Bros. Television Prods*. (2006) 38 Cal.4th 264, 279.)

When a supervisor is the harasser, the FEHA holds employers strictly liable. (See *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 707.) But under Title VII, an employer can evade liability if there is no tangible employment action, and if it exercised reasonable care to prevent and correct any harassing behavior and the plaintiff unreasonably failed to take advantage of the employer's preventive or corrective opportunities. (See *Vance v. Ball State Univ.* (2013) 570 U.S. 421.) When the harasser is a coworker, employer liability under both Title VII and the FEHA turns on whether the employer knew or should have known of the harassment and failed to take appropriate corrective action. (See *Roby*, 47 Cal.4th at 707; *Vance,* 570 U.S. at 421.)

Defendants are fond of stating that Title VII is not a "general civility code," and "simple teasing, offhand comments, and isolated incidents" are insufficiently "severe" to be actionable. (*Manatt*, 339 F.3d at 798.) But "extremely serious" single incidents can create an HWE, and the unique status of the N-word as "probably the most offensive word in English" should mean, as Judge Kavanaugh holds, that a single use of it in the workplace creates an HWE.[3] (See *Manatt*, 339 F.3d at 798; *Ayissi-Etoh*, 712 F.3d at 580.)

Ninth Circuit precedent for liability based on the N-word

The Ninth Circuit has condemned the N-word in the strongest language, describing it as "highly offensive and demeaning," "evoking a history of racial violence, brutality, and subordination," "perhaps the most offensive and inflammatory racial slur in English," "a word expressive of racial hatred and bigotry," "more than [a] mere offensive utterance," and "the most noxious racial epithet in the contemporary American lexicon." (*McGinest v. GTE Serv. Corp*. (9th. Cir 2004) 360 F.3d 1103 (citations and internal quotation marks omitted); *Monteiro v. The Tempe Union High Sch. Dist*. (9th Cir. 1998) 158 F.3d 1022, 1034.) "No word in the English language is as odious or loaded with as terrible a history." (*McGinest*, 360 F.3d at 1103 (citation omitted).)

Examples where harassment involving the N-word overcame summary judgment abound from courts around the Ninth Circuit. (See, e.g., *Paul v. Asbury Automotive Grp., LLC*, (D. Or. 2009) WL 188592 (denying summary judgment where plaintiff presented evidence of supervisors and coworkers making racist comments, including calling the plaintiff "a half-black nigger that's sick in the head"); *Gillum v. Safeway Inc*., (W.D. Wash. 2015) WL 1538453 (denying summary judgment where managers called the plaintiff "nigger" and "boy," referred to one part of town as "niggerville," and said to the plaintiff, "dead nigger, we are going to get you . . . I am going to fuck you up"); *Newton v. Suncrest Healthcare Cent., LLC*, (D. Ariz. 2009) WL 4151180 (denying summary judgment where a supervisor allegedly used "coon" and "nigger," asked one plaintiff if she was going to eat "that nigger food," and made other racist comments); *Thompson v. N. Am. Terrazzo, Inc*. (W.D. Wash. 2015) WL 926575 (denying summary judgment where plaintiff claimed supervisor called him "nigger," a "F'ing Uncle Tom," "whitewash," and said "Yo, you nigger, my mother fucking daughter is black" when plaintiff asked him to stop).)

Courts in the Ninth Circuit have permitted cases to go to trial based upon even a single usage of the N-word by a coworker, accompanied by several less severe instances of alleged workplace discrimination. In particular, in *Johnson v. Riverside Healthcare System, LP* (9th Cir.

2008) 534 F.3d 1116, a case brought under 42 U.S.C. § 1981, the court reversed a grant of summary judgment against a black physician alleging an HWE based upon one usage of the N-word by another doctor, along with other allegations. Dr. Johnson alleged he discovered a colleague had overlooked a patient's skull fracture, so Dr. Johnson performed the necessary procedure and thereby exposed his colleague's mistake. Angered, the colleague approached Dr. Johnson in a threatening way, screaming, "You fucking nigger – why did you do that to me?" It was error to grant summary judgment.

The District of Nevada issued a similar decision in *Collins v. Landry's, Inc.* (D. Nev. 2016) 2016 WL 8732418, where the court denied summary judgment based upon a single usage of the N-word by a coworker, accompanied by less severe comments. The plaintiff worked as a nightclub cocktail waitress and alleged a coworker told her, "You're our token black girl," another man "loves chocolate," and "try to comprehend this like a nigger trying to read." The court found these three statements sufficient for the HWE claim to survive summary judgment.

State court precedent for liability based on the N-word

The California Courts of Appeal have held that the N-word may be a "fighting word" in itself, and "simple use of the word" has "the potential for violence." (*Lee v. Superior Court,* 9 Cal.App.4th at 516-17 (citation omitted).) The N-word is an epithet so inflammatory that a person "of common intelligence would understand [it] likely to cause an average addressee to fight." (*Id.* at 518 (citation omitted).) The Courts of Appeal have precluded summary judgment where the N-word was used. (See, e.g., *Marigny v. Mercury Air Center*, (2003) WL 21978622 (unpublished) (reversing summary judgment for the employer where supervisors and coworkers used the N-word and one trainee called the plaintiff a "skinny little nigger" and threatened to "whoop him"); *Matthews v. U.S. Bancorp,* (2005) WL 2050074 (unpublished) (reversing summary judgment where a female bank teller alleged a coworker called her "stupid nigger" and her manager referred to her as "the Black girl" to a customer, asked her "What do you call those Black gang members?").)

Support for single-use liability around the country

The Second, Fourth, Sixth, and Seventh Circuits have joined the D.C. Circuit (recall Judge Kavanaugh's words) in suggesting that a single instance of a supervisor calling a subordinate the N-word may be sufficiently severe for an HWE claim. "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 such as 'nigger' by a supervisor in the presence of his subordinates." (*Rodgers v. Western Southern Life Ins. Co.,* 12 F.3d 668, 675 (7th Cir. 1993) (citation and internal quotation marks omitted); see also *Ezell v. Potter*, 400 F.3d 1041, 1048 (7th Cir. 2005) (stating "in the case of racial and ethnic slurs, some words are so outrageous that a single incident might qualify for a hostile environment claim").) The Fourth Circuit followed *Rogers* in *Spriggs v. Diamond Auto Glass*, adding that "[f]ar more than a mere offensive utterance, the word 'nigger' is pure anathema to African-Americans." (242 F.3d 179, 185 (4th Cir. 2001) (citation and internal quotation marks omitted).) The Sixth Circuit also does "not exclude the possibility that only one or two incidents of race-based harassment may be so severe as to constitute a hostile work environment." (*Reed v. Procter & Gamble Mfg. Co*. (6th Cir. 2014) 556 Fed. Appx. 421, 433 n.2) (citation omitted).) In *Daniel v. T & M Protection Resources, LLC* (2nd. Cir. 2017) 689 Fed. Appx. 1, the Second Circuit reversed the district court's finding that the one-time use of the N-word by a supervisor could not, by itself, support an HWE claim as a matter of law. The court also held that where a supervisor calls a subordinate the N-word once, the plaintiff may rely upon facially neutral conduct to bolster a racial harassment claim.

The U.S. Equal Employment Opportunity Commission (EEOC) has also long held that a single use of the N-word can violate Title VII. In an amicus brief submitted in *Rodgers*, the EEOC stated that "the use of the word 'nigger' by a white supervisor is patently offensive," and that a single use can be actionable under Title VII. The EEOC reiterated this position in a 2006 Title VII Compliance Manual, stating that "[e]xamples of the types of single incidents that can create a hostile work environment based on race include . . . an unambiguous racial epithet such as the 'N-word.'" (See EEOC Compl. Man., Race and Color Discrimination § 15-VII(A)(2), 2006 WL 4673430 (June 2006).) In 2016, the EEOC also submitted an amicus brief in *Daniel* arguing that a supervisor saying "you fucking nigger" to a subordinate by itself constitutes an actionable HWE. (See Brief of the U.S. EEOC as Amicus Curiae, *Daniel v. T & M Prot. Res., LLC* (2nd. Cir. 2017) 689 Fed. Appx. 1.) These EEOC positions taken in litigation are entitled to deference under *Auer v. Robbins* (1997) 519 U.S. 452.

The Massachusetts Appeals Court holds that "a supervisor who calls a black subordinate a 'fucking nigger' has engaged in conduct so powerfully offensive that liability for racial discrimination [under Massachusetts state law] may be based on a single instance. That term inflicts cruel injury by its very utterance. It is degrading, it is humiliating, and it is freighted with a long and shameful history of humiliation, the ugly effects of which continue to haunt us all. The words have no legitimate place in the working environment – indeed, they have no legitimate place – and there is no

conceivable justification for their use by a workplace supervisor." (*Green v. Harvard Vanguard Med. Assocs., Inc*. (2011) 944 N.E.2d 184, 187 (citation omitted).) California's Supreme Court should adopt this position.

Conclusion

Courts are ordered to construe Title VII and the FEHA liberally to root out racial discrimination. Several decades after enactment of these civil rights laws, anti-black racism persists in some California workplaces. Defendants' banality about "general civility codes" ignores the fact that racial epithets operate to keep African-Americans socially and economically disempowered. Ending racial discrimination means holding employers liable for racist verbal harassment. Plaintiffs' counsel prosecuting civil rights employment cases should push for liability where there is even a single instance of a supervisor calling a subordinate the N-word, or a single episode of an employer failing to take appropriate corrective action after learning of the N-word surfacing in its workplace.


Schwartz

Bryan Schwartz is co-lead counsel in Vaughn v. Tesla, *asserting class claims on behalf of black factory workers who were called the N-word. He has an Oakland-based firm representing workers in class, collective, and individual actions in discrimination, wage/hour, whistleblower, and unique federal and public employee claims. He practices in state and federal trial and appeals courts, in arbitration, and before a variety of administrative agencies. He is past Chair of the 8,000+ State Bar Labor and Employment Law Section (now called California Lawyers Association), and on the Board of Directors of Legal Aid at Work, the Foundation for Advocacy, Inclusion and Resources (FAIR), and until recently, the California Employment Lawyers Association. He is a regular speaker, moderator, and conference co-chair on employment law issues, and a frequent contributor to Plaintiff magazine and other publications. www.BryanSchwartzLaw.com*


Junker

Matthew Junker is a summer associate at Bryan Schwartz Law. *He is Senior Articles Editor of the Berkeley Journal of Employment and Labor Law and a future clerk in the Southern District of West Virginia, after which he plans to return to California to continue fighting for workers.*

Endnotes:

[1] Angela Hanks, Danyelle Solomon & Christian E. Weller, *Systematic Inequality: How America's Structural Racism Helped Create the Black-White Wealth Gap*, Center for American Progress (Feb. 21, 2018, 9:03 AM), https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality.

[2] Heidi Beirich & Susy Buchanan, *2017: The Year in Hate and Extremism,* Southern Poverty Law Center (Feb. 11, 2018), https://www.splcenter.org/fighting-hate/intelligence-report/2018/2017-year-hate-and-extremism.

[3] Use of the N-word may also be sufficient to show a defendant's discriminatory intent for proving other discriminatory adverse actions. (See *Cornwell v. Electra Cent. Credit Union* (9th Cir. 2006) 439 F.3d 1018, 1029 n.7 ("[A] plaintiff could offer direct evidence of an employer's discriminatory intent, for example an employer's use of a racial epithet."); *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 119 ("When used [as a derogatory epithet directed against women], the word [bitch] can be compared to a racial slur. In conjunction with the other evidence Pantoja presented, its reported use here was probative of the user's discriminatory intent" for both HWE and discriminatory termination claims).)