

California Supreme Court: One co-worker's N-word usage may suffice for harassment claim

Bailey v. San Francisco District Attorney is a major victory for workers like those in Tesla race-harassment class action

By Bryan Schwartz

Use of the N-word at work is never OK for ordinary workplaces in California, yet some employers – like Tesla – allow use of the N-word to spread without stopping it. In May 2024, the Alameda County Superior Court certified my firm's nearly seven-year-old class action with co-counsel against Tesla, *Vaughn v. Tesla*, based upon this racist work environment, with the N-word rampant in the Fremont factory, and Tesla's failure to prevent this from harming thousands of Black workers there. I believe it is *the largest harassment class action ever certified*. Then on July 29, 2024, the California Supreme Court gave a big boost to the Tesla workers' claims with its decision in *Bailey v. San Francisco District Attorney*.

One alleged use of N-word by a co-worker, and cold shoulder from HR

Twanda Bailey alleged she was called the N-word by a co-worker at the San Francisco District Attorney's office, and then suffered intimidation from Human Resources after she reported the incident. The Superior Court granted summary judgment, dismissing her claims, and the Court of Appeal affirmed, but the California Supreme Court reversed the decisions below. The Supreme Court held that a co-worker's one-time use of a racial slur may be actionable in a claim of harassment, so severe as to alter the conditions of employment and create a hostile work environment. (S265223, Slip Op. at 2.) The Supreme Court further held that a course of conduct that tries to block an employee from reporting and addressing race harassment can be an actionable claim of retaliation. (*Ibid.*)

After roughly 14 years of working at the District Attorney's Office, most recently as an investigative assistant, Ms. Bailey was called an N-word by a co-worker (Larkin) in 2015, who allegedly said "You [N-words] is so scary." Ms. Bailey told other co-workers about the incident, and her supervisor learned of the incident and reported it to upper management. Upper management met with Ms. Bailey about the incident and said, "management would address the issue," but management only met with the alleged perpetrator to tell her that use of the alleged language (which she denied) was unacceptable, taking no further action. (Slip Op. at 5.) The HR

Copyright © 2024 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



representative who was informed of the incident, who was supposedly Larkin's best friend, did not file a formal complaint with the City's Department of Human Resources (DHR), as City policy required. (*Ibid.*) The HR representative said that, "since the allegation had never been proven, [management] should not take action to separate" Ms. Bailey from the alleged harasser. (*Ibid.*)

Ms. Bailey subsequently asked for a copy of the complaint filed on her behalf, and after learning that none was filed, requested that a complaint be filed, but the HR representative refused. (Slip Op. at 5.) Instead, the HR rep told Ms. Bailey that she should not have told her co-workers about the alleged harassment because doing so could create a hostile work environment for the alleged harasser! (*Ibid.*) The same HR rep thereafter continuously would ignore Ms. Bailey, laugh at her, stare rudely at her, and said Ms. Bailey's workers' comp claim was not "real" – all of which Ms. Bailey believed was in retaliation for her complaint of harassment. (Slip Op. at 6.) Ms. Bailey subsequently received a performance review, which criticized her for her attendance and her responsiveness to supervisor requests, though her "met expectations" rating overall was the same as it had been in prior years. (Slip Op. at 7.)

Despite the HR rep refusing to file Ms. Bailey's hostile work environment complaint, the DHR nonetheless learned of Ms. Bailey's complaint, but concluded that her allegations were "insufficient to raise an inference of harassment/hostile work environment or retaliation" and that DHR therefore would not investigate them. (Slip Op. at 7.) Importantly, DHR claimed that "one [N-word] comment was insufficient to create an abusive working environment" and that the HR rep's refusal to allow Ms. Bailey to file a complaint "would not impair a reasonable employee from making a complaint." (*Ibid.*) DHR found the other negative behaviors by the HR rep toward Ms. Bailey to be "mere 'social slights.'" (Slip Op. at 8.) Still, DHR met with the alleged harasser to sign a copy of the City's anti-harassment policy and gave the HR rep a written instruction about how to report EEO complaints. (*Ibid.*)

Shortly thereafter, Ms. Bailey claimed that the HR rep pulled up to her in the parking lot and said, "You are going to get it" while gesturing in a threatening manner. (Slip Op. at 8.) She felt intimidated by the HR rep in the office and felt she had "nowhere to go." (Slip Op. at 9.) Ms. Bailey was thereafter treated for severe anxiety and depression. (*Ibid.*) DHR supposedly investigated thereafter and found the allegations "not sustained." However, the HR rep had the responsibility for employee complaints/discipline reassigned away from her and was herself disciplined based upon conduct toward a different Black co-worker harassed by Larkin. (*Ibid.*) The City subsequently approved Larkin being transferred away from Ms. Bailey. (*Ibid.*)

One co-worker N-word usage may suffice for harassment claim

Ms. Bailey sued the City, and the summary judgment briefing focused on whether a single use of the N-word could be race harassment and whether an adverse employment action of retaliation could arise from how the HR rep and DHR handled Ms. Bailey's complaints. (Slip Op. at 10.) The trial court decided that "no trier of fact could find severe or pervasive racial harassment based on being called a [N-word] by a co-worker on one occasion." (Slip Op. at 11.) The trial court also dismissed the retaliation claim, finding no evidence of a "substantial and material change in the terms and conditions" of Ms. Bailey's employment. (Slip Op. at 11.)

The Supreme Court rejected these determinations, reiterating that the California Fair Employment and Housing Act (FEHA) is to be construed "broadly and liberally" to eliminate discriminatory practices in the workplace. (Gov. Code, § 12920; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054 n. 14.) (Slip Op. at 12.) Prohibited discriminatory harassment includes, among other types, verbal harassment such as "epithets, derogatory comments or slurs" based upon race. (Slip Op. at 13; Cal. Code Regs., tit. 2 § 11019, subd. (b)(2)(A).) A racially hostile work environment under FEHA requires proof that conduct was: (1) unwelcome; (2) because of race; (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment; and (4) imputable to the employer. (Slip Op. at 13.) The Supreme Court considered whether the one-time N-word usage by Larkin was severe and whether it could give rise to liability by the City. (*Ibid.*)

FEHA harassment claims address "situations in which the social environment of the workplace becomes intolerable because the harassment (whether verbal, physical, or visual) communicates an offensive message to the harassed employee." (Slip Op. at 14, quoting *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 706.) Thus, unlike FEHA discrimination claims, which address changes in the terms, conditions, or privileges of employment, and are exercises of "official actions on behalf of the employer," a harassment claim refers to "interpersonal relations in the workplace" and "need not exercise delegated power on behalf of the employer to communicate an offensive message." (*Id.*, quoting *Roby, id.* at 706-707 ["it does not matter for purposes of proving harassment whether the harasser is the president of the company or an entry-level clerk"].) Also, echoing the U.S. Supreme Court in *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21, the California Supreme Court held that a "discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." (Slip Op. at 15.)

The City argued that "one offensive utterance made in a private conversation

Copyright © 2024 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



between two co-workers" could not rise to the level of severe or pervasive harassment – but the Supreme Court agreed with Ms. Bailey that the Court of Appeal's rejection of her case placed "undue emphasis on the speaker's status as a co-worker." (Slip Op. at 16.) The Supreme Court invoked the Ninth Circuit's decision in *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1116, which held that although a racially motivated comment might be considered "innocent or only mildly offensive" to someone outside the targeted group, it could be "intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group." (Slip Op. at 16.) The Supreme Court empathized with someone in the position of Ms. Bailey, whose complaint was overlooked when it was considered "solely from the perspective of an adjudicator" who was not Black/African American. (Slip Op. at 17.)

The Supreme Court agreed with the Court of Appeal that a one-time use of the N-word or another racial epithet "can be so offensive it gives rise to a triable issue of actionable harassment." (Slip Op. at 17.) The Court, citing *Boyer-Liberto v. Fontainebleau Corp.* (4th Cir. 2015) 786 F.3d 264, 277, noted that although hostile work environment claims "often involve repeated conduct, it is not required." (Slip Op. at 17.) The severe or pervasive standard for harassment allows that "an isolated incident of harassment, if extremely serious, can create a hostile work environment." (*Id.*, citing, *inter alia*, *Boyer-Liberto*, at p. 286, and *Ayissi-Etoh v. Fannie Mae* (D.C. Cir. 2013) 712 F.3d 572, 579 (conc. opn. Of Kavanaugh, J.).) The Supreme Court noted that FEHA was amended effective January 1, 2019, to elucidate standards governing claims of harassment, and explicitly now provides that a single incident of harassing conduct can be sufficient (Gov. Code, § 12923) – and that, whether or not the amended language is retroactive, the *Bailey* holding is consistent with section 12923. (Slip Op. at 18, n. 5.) In addition to *Boyer-Liberto*, *Ayissi-Etoh*, and *McGinest, supra*, the California Supreme Court cited approvingly the EEOC Compliance Manual and federal Circuit Court authorities, holding that the single use of "an unambiguous racial epithet such as the 'N-word' may suffice" to create a hostile work environment. (Slip Op. at 18-19, citing U.S. Equal Employment Opportunity Commission, Section 15: Race & Color Discrimination (Apr. 19, 2006) 15-VII Equal Opportunity for Job Success, p. 15-37 (EEOC Compliance Manual); *Spriggs v. Diamond Auto Glass* (4th Cir. 2001) 242 F.3d 179, 185; *Woods v. Cantrell* (5th Cir. 2022) 29 F.4th 284, 285; *Rodgers v. Western-Southern Life Ins. Co.* (7th Cir. 1993) 12 F.3d 668, 675; *Alston v. Town of Brookline* (1st Cir. 2021) 997 F.3d 23, 47; *Lounds v. Lincare, Inc.* (10th Cir. 2015) 812 F.3d 1208, 1230; *Ellis v. Houston* (8th Cir. 2014) 742 F.3d 307, 325; *Rivera v. Rochester Genesee Regional Transp. Authority* (2d Cir. 2014) 743 F.3d 11, 24.) The Supreme Court specifically disapproved any reading of a prior decision, *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 147 n. 9, a case permitting injunctive relief under FEHA, for the position that a single use of a racial epithet cannot constitute actional harassment. (Slip. Op. at 20-21, n. 6.)

The California Supreme Court cited *Alcorn v. Anbro Engineering* (1970) 2 Cal.3d 493, 498 n. 4, showing how California law has long understood the "particularly abusive and insulting" nature of the N-word. (Slip Op. at 20.) California's high court joined the "chorus of other courts in acknowledging the odious and injurious nature of the N-word in particular…[which carries] the stinging barbs of history, which catch and tear at the psyche the way thorns tear at the skin." (*Ibid.*) The N-word is not a mere offensive utterance, but may be "intrinsically humiliating," depending on the totality of the circumstances. (*Ibid.*) Use of the N-word is "discrimination *per se*." (Slip Op. at 25., citing *Rodgers*, 12 F.3d at 675.)

The first decision to hold that a single word is sufficient

Bailey was the first decision to hold that a single *co-worker* N-word usage can also suffice for a hostile work environment claim. But, given the unique, horrific nature of the term, it is not dispositive whether the term is used by a supervisor or non-supervisor: A "rigid distinction between supervisors and coworkers fails to take into account the full context of the workplace. In some work environments, for example, an employee may interact with their supervisor only rarely but be required to work intimately with a coworker." (Slip Op. at 23.) "[N]ot all power appears on an organizational chart…. Where a supervisor allows a harassing subordinate to act with impunity or appears to ratify their conduct, this may imbue the subordinate with a certain degree of authority to alter the working conditions of their coworkers." (Slip Op. at 24.)

There is no "magic number of slurs that creates a hostile work environment." (Slip Op. at 24, citing *Paschall v. Tube Processing Corp.* (7th Cir. 2022) 28 F.4th 805, 815.) As such – with the Supreme Court reinforcing the holding in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 264 – hostile work environment cases are rarely "determinable on paper" – that is, they should proceed to trial, and not be summarily dismissed. (Slip Op. at 25, n. 7.) A jury could find that the single use of the N-word was "degrading and humiliating in the extreme," and so the hostile work environment claim based upon its single use by a co-worker should not have been dismissed on summary judgment. (Slip Op. at 25-26, quoting *Spriggs*, 242 F.3d at 185.)

The City could be liable for the coworker's use of the N-word because the City's agents knew or should have known of the conduct and failed to take immediate and appropriate corrective action. (Sip Op. at 27, citing Gov. Code, § 12940, subd. (j)(1).) Even though the HR rep's

Copyright © 2024 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



conduct was not motivated by Ms. Bailey's race, the City could face liability based upon negligence – and intent is not an element of negligence. (Slip Op. at 28.) The evidence suggesting that complaints of harassment to the HR rep would not be taken seriously "actively undermined the remedial efforts of others," and the Court of Appeal and trial court erred in failing to concern the matter of immediate and appropriate corrective action. (Slip Op. at 29.)

As to the retaliation claim, the Supreme Court reiterated that retaliatory acts may take the form of a series of subtle, yet damaging, injuries. (Slip Op. at 32, quoting *Yanowitz*, *supra* at 1055-1056.) Considered collectively, the obstruction of the investigation of the harassment claim, chastising of Ms. Bailey for telling other employees about the harassment, initial refusal to separate Ms. Bailey from Larkin, HR rep's hostility toward Ms. Bailey after the complaint (including saying she was "going to get" her), and negative comments in Ms. Bailey's performance review, could be found to constitute a "course of conduct that rises to the level of an adverse employment action." (Slip Op. at 32-33.) Because "employment without discrimination because of race is a civil right," "the withdrawal of an employee's right to avail themselves of the HR process typically available to other employees materially affects the 'terms, conditions, or privileges' of their employment…. Such treatment is reasonably likely to impair the affected employee's job performance insofar as it leaves them unprotected from the very harms FEHA was designed to eliminate." (Slip Op. at 34.) "Where a supervisor or other person of authority obstructs and threatens to punish a reporting employee if she persists in bringing a complaint to higher level officials, such acts may be considered by a jury to constitute actionable retaliation." (Slip Op. at 34-35.) It was significant that Ms. Bailey was aware of another Black/African American employee who was reassigned after incidents with Larkin, the same alleged harasser. (Slip Op. at 36.)

Vaughn v. Tesla

Since commencing the *Vaughn v. Tesla* class action in 2017, my firm and co-counsel have pressed for liability in civil rights employment cases 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. In *Bailey*, the California Supreme Court provided unequivocal support for our long-held position in the pending *Vaughn v. Tesla* litigation.

In *Vaughn*, the Alameda County Superior Court recently certified our class action, finding (about a year after we filed the motion, after considering six rounds of briefing and hearing two lengthy oral arguments) that "[t]he approximately 500 declarations in support of and in opposition to this motion suggest that over a period of approximately eight years Tesla workers in the Fremont factory heard the N-word and otherwise experienced conditions that might reasonably be characterized as race harassment." In our briefing, we consistently cited the same cases now encompassed within the *Bailey* decision, like *McGinest*, *Ayissi-Etoh*, and *Alcorn*, *supra*. We estimate we may have 10,000 class members in our class certified for injunctive relief and on three common issues, including whether there was a "pattern or practice of pervasive race harassment" at the Fremont factory, whether the company "knew or should have known" about it, and whether the company failed to "take immediate and appropriate corrective action." After trial on these common issues, we will be prosecuting lawsuits for damages for likely over 1,000 individual claimants – each of whom experienced the N-word at Tesla. Tesla consistently argued in trying to defeat class certification that the circumstances of each N-word usage were different – e.g., whether it was from a supervisor, whether it was from another Black/African American, etc. – so that individualized issues predominated. They were wrong. After *Bailey*, because the law in California is now clearly that the N-word is *never okay* in an ordinary workplace, we believe Tesla should be unable to obtain summary judgment against anyone in the class, and all will proceed to trial on their damages.

After *Bailey*, and with our high-profile action progressing against Tesla, California employers will know they must be more vigilant in keeping the N-word and other forms of race harassment out of the workplace. If they do not, we in the plaintiffs' bar will be ready, and better armed than ever, to make them comply with the FEHA.


Schwartz

Bryan Schwartz is the principal of Bryan Schwartz Law, P.C., *in Oakland, representing workers in class, collective, and individual actions, including discrimination, wage/hour, whistleblower, and unique federal and public employee claims. He is the past chair of the 8,000+-member State Bar Labor & Employment Law Section (now in the California Lawyers Association), a member of the Board of Directors of Legal Aid at Work and the Foundation for Advocacy Inclusion and Resources (FAIR), and a former Executive Board member of the California Employment Lawyers Association. He is a regular speaker at conferences and a frequent contributor to Plaintiff, Advocate, and other publications. www.BryanSchwartzLaw.com, bryan@bryanschwartzlaw.com.*

Copyright © 2024 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**