

“IF THEY HATE YOU, THEY MUST HATE ME TOO”

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On February 9, 2012, the U.S. Court of Appeals for the 5th Circuit addressed the issue of whether alleged harassment toward African-American employees could support the claim that there was a hostile work environment for two Hispanic employees. The court concluded it could not in the particular case before it, stating that “if the evidence of the workplace environment for the employees of plaintiff’s race does not show frequent, severe and pervasive hostility, then evidence of hostility towards a different racial group is not much support for the plaintiff’s claim.”

Thus, the 5th Circuit affirmed a federal district court’s summary judgment order in favor of the employer on two Hispanic employees’ hostile work environment claims, finding the evidence of alleged harassment against the Hispanic employees insufficiently frequent, severe or pervasive. However, the 5th Circuit noted, “whether that conclusion is always correct, we need not decide.”
Hernandez, et. al. v. Yellow Transportation, Inc.

FACTS

Two Hispanic employees at a trucking terminal brought claims of race discrimination and retaliation, including hostile work environment harassment claims. The claims also included a claim by a Caucasian employee that his association with African-American and Hispanic employees resulted in a hostile work environment and retaliation against him.

One Hispanic employee claimed that he was called a racially derogatory term on one occasion and once saw a poster or

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letter that was derogatory about Hispanics. Another Hispanic employee claimed that he once heard Mexicans referred to in a derogatory manner over a company radio and had seen a derogatory posting or drawing. The Hispanic employees also attempted to rely on evidence of alleged harassment against African-Americans in support of their hostile work environment claims.

The district court granted summary judgment to the employer on all of the claims brought by three plaintiffs. In doing so, the district court held that examples of harassment toward African-American employees could not support the claim that there was a hostile work environment for the two Hispanic employees.

THE 5TH CIRCUIT'S DECISION

On appeal, the two Hispanic employees claimed that the district court erred by refusing to consider all of the evidence of harassment, including harassment allegedly suffered by African-Americans and instances of non-race-based harassment. The 5th Circuit noted that whether the rejection of that evidence was proper was the key appellate issue on these claims.

Race-based harassment affects the employment relationship when it is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. An employer is liable for harassment by a co-worker where it knows or should have known of the harassment and fails to take prompt corrective action. A wide range of behaviors can make a workplace uncivil, but an employee must show that the conduct was based on his or her race.

The 5th Circuit noted that it has held in the context of a sex discrimination claim that harassment of women other than the plaintiff *is* relevant to a hostile work environment claim, but noted that it was still an unanswered question "whether evidence of harassment towards African-American employees can help support claims of a hostile work environment towards Hispanic employees." In the case before it, the 5th Circuit agreed with the district court that the evidence offered of an alleged hostile work environment for African-American employees could not transform what was an otherwise insufficient case of a hostile work

environment by two Hispanic employees into one that could survive summary judgment.

WHAT IT MEANS FOR EMPLOYERS

For some purposes, an employee has been allowed to introduce evidence of discrimination against others. For example, a woman who herself was not the object of harassment might have a harassment claim if she was forced to work in an atmosphere in which such harassment was pervasive. But when a plaintiff's claims of alleged harassment against his or her own protected class (in this case, race) are not frequent, severe, or pervasive to support a hostile work environment claim, reliance on harassment against another protected race is not sufficient to allow the case to survive summary judgment, at least under the 5th Circuit's opinion.

The decision is precedent only in the states of Texas, Louisiana, and Mississippi, although it may be persuasive to other Courts of Appeals. In addition, the court was careful to state that it was not deciding whether its conclusion "was always correct," leaving open the possibility that where the evidence of harassment against a plaintiff's own protected class is sufficiently severe or pervasive, evidence of discrimination against another protected class might be relevant.

The bottom line is that employers should continue to take appropriate corrective action against employees who engage in discriminatory behavior or remarks against any race regardless of who was present when the behavior or remarks occurred.

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