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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Workplace Slur Harassment Ruling A Warning To Employers

By **Matt Fair**

Law360, Philadelphia (July 19, 2017, 7:38 PM EDT) -- The Third Circuit's recent decision that a single use of a racial slur, rather than pervasive conduct, can sustain a workplace harassment claim sends a clear warning to employers to preempt potential liability by providing training to prevent even one-off incidents from happening in the first place, attorneys say.

The **ruling on Friday** revived a lawsuit from a pair of former contractor workers with Chesapeake Energy Corp. as it clarified that the standard to be met for asserting a valid harassment claim was whether the treatment they faced, which included a supervisor's use of the N-word, was either severe or pervasive.

The court clarified the standard after a trial court had thrown out the case after concluding the workers had to show their treatment had been pervasive and regular.

"I think what a case like this, at least from my perspective, really sets forth for employers is the importance of training on harassment prevention in the workplace and making sure your employees — certainly managers, but ideally everyone — know that even a single comment may now be enough to create liability for the organization," said Duane Morris LLP partner Michael Cohen.

The ruling stems from a lawsuit brought by Atron Castleberry and John Brown against staffing agency STI Group over their experiences after being assigned to work as general laborers for Chesapeake.

The two men alleged in their lawsuit that a supervisor, after assigning them to a fence-clearing operation, threatened that they would be fired if they "[N-word]-rigged" the job.

Two weeks after reporting the offensive language to a superior, the Third Circuit's opinion said, the two men were fired without explanation. They were rehired shortly thereafter, only to be terminated again for "lack of work."

The pair brought harassment, discrimination and retaliation claims as part of their lawsuit, but saw the allegations junked by U.S. District Judge Matthew Brann on a motion to dismiss.

The Third Circuit, however, said the trial judge had applied the wrong standard in concluding that the two men needed to show their treatment had been "pervasive and regular."

In rearticulating the standard required to assert a viable workplace harassment claim, the Third

Circuit noted that its own precedent on the issue had helped to breed uncertainty.

The opinion pointed to past rulings that characterized the standard alternatively as "pervasive and regular," "severe and pervasive" and "severe or pervasive," and noted that these did not always align with the U.S. Supreme Court's stance on the issue.

"Thus we clarify," U.S. Circuit Judge Thomas Ambro wrote for the court. "The correct standard is 'severe or pervasive.'"

And under the clarified standard, the panel concluded, the allegations were sufficient to survive a motion to dismiss.

"Under the correct 'severe or pervasive' standard, the parties dispute whether the supervisor's single use of the 'N-word' is adequately 'severe' and if one isolated incident is sufficient to state a claim under that standard," the opinion said. "Although the resolution of that question is context-specific, it is clear that one such instance can suffice to state a claim."

Given both the inconsistencies in the Third Circuit's prior holdings on the subject and the relevant precedent from the Supreme Court, attorneys said the Third Circuit's ruling adopting the disjunctive standard was not unexpected.

"It's not surprising that the Third Circuit clarified the standard because, as the court notes, Third Circuit case law has been a bit inconsistent," said Post & Schell PC partner Kate Kleba. "It's also not surprising that the clarified standard is 'severe or pervasive' in view of the Supreme Court precedent articulating that as the standard."

But Jay Holland, a partner with Joseph Greenwald & Laake PA, said that the uncertainty over the standard has led trial courts to dismiss claims that could now, in the wake of the Third Circuit's ruling on Friday, be considered viable.

"There's been a tendency from a variety of courts, even after Supreme Court decisions that clarified the standard, to hold that, in order to qualify as a hostile work environment, the harassment had to be both severe and pervasive," he said.

Even under the newly articulated standard, however, Cohen stressed that the context of the slur — which came, in this case, in connection with a threat of termination — was something the Third Circuit noted was an important factor in determining whether the claim cleared the "severe or pervasive" hurdle.

"It appears to me that the single incident, the use of the N-word, while certainly egregious, may not have been sufficient to get past a motion to dismiss had it not also been accompanied by a threat of termination," he said. "It would have been interesting to see how the court would have decided this had the threat of termination not occurred in almost the same breath as the use of the N-word."

While workers may now have a more clearly defined path for moving their claims beyond a motion to dismiss, Ballard Spahr LLP partner Frank Chernak said that actually prevailing on their lawsuits would still prove challenging given the requirement that they prove there was some responsibility on the part of the employer.

"There's always that fifth element of the hostile work environment claim where you have to tag the employer with whatever was said," he told Law360.

That's where a robust training regimen comes in.

"Employers should be protecting themselves by continuing to train, having clearly defined policies and even training supervisors separately from line employees," he said.

And Holland said that "when those safeguards and those protocols are in place, I think employers will find that they will dramatically decrease their likelihood of liability and of lawsuits in general."

The workers are represented by Daniel Horowitz and Richard Swartz of Swartz Swidler.

STI is represented by Christine Line, Thomas May and Terri Patak of Dickie McCamey & Chilcote PC.

Chesapeake is represented by Daniel Brier and Donna Walsh of Myers Brier & Kelly LLP.

The case is Atron Castleberry et al. v. STI Group et al., case number 16-3131, before the U.S. Court of Appeals for the Third Circuit.

--Editing by Katherine Rautenberg and Philip Shea.
