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# Employers may be held liable for single-incident harassment claims – racial epithets made by non-supervisors

## EXAMINING *BAILEY* IN THE BROADER CONTEXT OF EMPLOYMENT-DISCRIMINATION LAW

In reversing an order granting summary judgment, the California Supreme Court's opinion in *Bailey v. San Francisco Dist. Attorney's Office* (2024) 16 Cal.5th 611, provides a comprehensive analysis of what constitutes an actionable claim for workplace harassment, and whether a single incident of harassment (use of the "N-word" by a non-supervisor) can be sufficient to create a hostile work environment. *Bailey* also addresses the extent to which an employer can be held liable for retaliation arising from the action or inaction of a human-resource person who, rather than fulfilling the employer's duty to take immediate and appropriate corrective measures reasonably calculated to end the harassment, shields the harasser and effectively ratifies the harassing conduct.

### Facts of the case

Plaintiff Twanda Bailey worked as an investigative assistant for the San Francisco District Attorney's Office. On one occasion, Larkin, a non-supervisory coworker with whom Bailey worked every day, directed a racial epithet at Bailey, calling her a "scary [N-word]."

Bailey did not immediately report the incident to HR due to fear of

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retaliation. Bailey understood that other employees who had experienced conflicts with Larkin had later been reassigned or terminated, which Bailey attributed to Larkin's close relationship with human resources employee Taylor-Monachino.

A coworker finally reported the incident on Bailey's behalf. In response, the Chief Administrative Officer conducted separate meetings with Bailey and Larkin, with Taylor-Monachino present at both meetings. Because Larkin denied using the slur, she received informal coaching on the City's Harassment Policy, but no formal discipline was imposed.

Despite a city policy requiring human-resources personnel to report incidents of workplace harassment to the City's Department of Human Resources (DHR), Taylor-Monachino failed to file a formal complaint. Taylor-Monachino also denied Bailey's direct request that a formal complaint be filed, and admonished Bailey that discussing the incident with coworkers could create a hostile work environment for Larkin. When the Chief Administrative Officer suggested that Bailey and Larkin should be separated, Taylor-Monachino objected, citing concerns that this action might unfairly suggest wrongdoing by either Bailey or Larkin.

Thereafter, Taylor-Monachino's behavior toward Bailey became openly hostile, prompting Bailey to eventually report the incidents to DHR directly. Separately, Bailey also contested a portion of her performance evaluation that criticized Bailey for attendance issues. Bailey objected, linking her absences to stress caused by working with Larkin and fear based on the threat that Bailey was somehow creating a hostile work environment for Larkin, her alleged harasser.

DHR eventually responded to Bailey's complaint with a letter acknowledging the extreme offensiveness of the N-word, but concluding that "one comment was insufficient to create an abusive working environment." The City also dismissed Taylor-Monachino's treatment of Bailey (e.g., unwillingness to speak with Bailey and staring at Bailey) as mere "social slights." Despite not sustaining Bailey's allegations, DHR separately issued a confidential report to the District Attorney's Office recommending corrective action. Larkin was required to formally acknowledge receipt of the City's Harassment Policy, and Taylor-Monachino received a memorandum of instruction, confirming her obligation to document and promptly submit all equal-employment-opportunity complaints to DHR.

Thereafter, Bailey reported a new incident involving Taylor-Monachino in the office parking lot, where Taylor-Monachino gestured to Bailey between their cars and mouthed the words, "You are going to get it." Bailey also described ongoing hostile acts, including Taylor-Monachino's refusal to greet her, chuckling as she walked by, and voicing disparaging remarks about Bailey's workers' compensation claim "not [being] real."

DHR concluded its second investigation into Bailey's allegations and once again notified Bailey that her allegations were not sustained – while finding that Taylor-Monachino had violated City policies in a separate incident unrelated to Bailey. The City approved a six-week leave of absence for Bailey after receiving a letter from her psychiatrist confirming treatment for severe anxiety and depression caused by "severe workplace stress." Around the same time, the District Attorney's Office announced the creation of a new HR position tasked with executing some of Taylor-Monachino's former duties, including addressing employee complaints and discipline.

## Lower courts dismiss Bailey's harassment and retaliation claims

In granting summary judgment for the City, the trial court concluded that no reasonable trier of fact could find severity or pervasiveness based on a single instance of being called the racial slur "N-word." The trial court also rejected Bailey's retaliation claim, concluding that her contested performance review, standing alone, did not constitute an adverse employment action, as there was no evidence it caused a substantial and material change in the terms and conditions of her employment. The court minimized Taylor-Monachino's conduct, stating that "social ostracism at the hands of coworkers does not amount to an adverse action." The Court of Appeal affirmed.

## One racial slur is enough

For an employee to prevail on a claim that a workplace is racially hostile under the Fair Employment and Housing Act, she must prove that she was subjected to harassing conduct that was (1) unwelcome; (2) because of race; and (3) sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment. Whether a work environment is reasonably perceived as hostile or abusive is evaluated in light of the totality of the circumstances, which may include: the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The severity or seriousness required to bring an actionable harassment claim varies inversely with the pervasiveness or frequency of the conduct. As such, repeated conduct is not required. An isolated act of harassment may be actionable if sufficiently serious in light of the totality of the circumstances.

The Supreme Court cited extensive authority recognizing use of the "N-word" as among the types of isolated incidents that can create a hostile work environment. In *Ayissi-Etoh v. Fannie Mae* (D.C. Cir. 2013) 712 F.3d 572, 577, the court noted that a single incident of directing an unambiguous racial epithet at an employee "might well have been sufficient to establish a hostile work

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environment," even without considering the additional harassing conduct at issue.

The objective-severity test directs courts to evaluate hostile-workplace allegations from the perspective of a reasonable person in the plaintiff's position. While individuals outside the plaintiff's protected class may not find specific conduct objectively intimidating or offensive, the same conduct can feel "intolerably abusive or threatening when understood from the perspective of a plaintiff [] member of the targeted group." (*McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1116.) The Court recognized the odious and injurious nature of the N-word in particular, which "carries with it, not just the stab of present insult, but the stinging barbs of history." (*Bailey, supra,* at p. 446.) "Far from 'a mere offensive utterance' (quoting authority), this slur may be intrinsically 'humiliating' depending on the totality of the circumstances." (*Ibid.*)

While the test is objective, the evaluation of offensiveness is inherently shaped by the plaintiff's subjective characteristics, which help to clarify the true impact of the conduct on a reasonable person in plaintiff's position. The test, therefore, requires a more nuanced consideration of the offensiveness of certain actions – beyond what a detached observer might not fully appreciate.

## A racial slur by a non-supervisor may create a hostile workplace

Even a non-supervisory coworker can create a hostile work environment. *Bailey* is instructive in pursuing claims of harassment where the alleged harasser lacks supervisory authority. The City argued that Larkin's use of a racial slur was not actionable because she lacked the authority to direct or supervise Bailey's work or otherwise affect the terms, conditions, or privileges of Bailey's employment. The Court dismissed the City's reliance on Larkin's non-supervisory status to evade employer liability. In analyzing the severity element, the Court distinguished FEHA discrimination from harassment, explaining that discrimination involves bias reflected in official actions taken on behalf of the employer, whereas harassment refers to bias communicated interpersonally in the workplace. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686.)

While the status of the speaker is relevant and considered a factor in assessing hostile-workplace claims, the analysis must bring to bear "a constellation of surrounding circumstances, expectations, and relationships [] not fully captured by a simple recitation of the words used or the physical acts performed." (*Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81-82.) The Court therefore rejected a "rigid distinction between supervisors and coworkers" that fails to account for this broader context. (*Bailey, supra*, at p. 447.)

A context-specific inquiry into the severity of the harassing conduct makes it possible to allege actionable harassment by non-supervisors. The close proximity of employees to coworkers, or having their work closely intertwined, might make employees more vulnerable to harassment by coworkers than supervisors, distinguishing facts which supported Bailey's claims. Providing another example, the Court hypothesized circumstances where "an ER nurse working [] with other care providers might find that harassment by such coworkers more quickly alters the conditions of their employment than harassment by a supervisor." (*Id.* at p. 633.) In *Bailey*, plaintiff and her coworker sat next to each other in a shared office space, shared work duties, and covered each other's desks, making the alleged hostility unavoidable.

Moreover, the Court acknowledged that a coworker's influence in the workplace may extend beyond formal titles, direct authority, or mere "social slights" around the water cooler. A peer "who holds the manager's ear, is given preferential treatment, or has special sway" over office dynamics can significantly alter the conditions of others' employment. (*Bailey, supra*, at p. 633.) If a supervisor permits such a coworker to behave without consequence – or worse, appears to condone their conduct – that coworker's actions may carry a soft authority capable of shaping the work environment and intensifying the impact of the harassment.

Taking these factors into account, the Court held that a reasonable jury could conclude that Larkin acted with impunity due to her close relationship with HR manager Taylor-Monachino, thereby influencing Bailey's working conditions. This conclusion is further supported by Bailey's reluctance to report Larkin, rooted in her perception that Larkin enjoyed favored status. Additionally, the note from Bailey's psychiatrist indicated that the racial slur and resulting workplace stress contributed to her severe anxiety and depression, supporting a finding that the harassment interfered with her work performance.

## Adverse actions are considered collectively

The lower courts dismissed Bailey's isolated complaint regarding the criticism identified in her performance evaluation as not constituting an adverse action. However, the Supreme Court cited *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037, approvingly, confirming that retaliatory acts are to be considered "collectively," rather than individually. (*Id.* at pp. 1055-1056.) Retaliatory acts may take the form of "a series of subtle, yet damaging, injuries," and "[e]nforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute." (*Ibid.*)

By isolating and assessing whether an adverse action existed based solely on the slights referenced in the performance evaluation, the lower court failed to consider the collective and cumulative impact, which, in the totality of the

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circumstances, might well constitute an adverse action.

### Employer liability for HR's abrogation of the duty to address harassment

*Bailey* is the first case to address the issue of whether an employer's response to harassment constitutes immediate and appropriate corrective action. The parties disputed the significance of Taylor-Monachino's conduct, with the employer arguing that it was largely irrelevant to the inquiry of whether appropriate corrective action had been taken. The City claimed that it took steps to end the *racial* harassment by Larkin, and that Taylor-Monachino's conduct "was not based on Bailey's race."

The Supreme Court rejected this view, noting that the FEHA establishes a negligence standard to determine whether an employer is liable for harassment by a non-supervisory employee. (*Roby, supra,* at p. 707.) Intent – whether or not race motivated the conduct – is not an element of negligence, rendering Taylor-Monachino's motives irrelevant.

The irony of Taylor-Monachino being the HR person charged with receiving and acting on complaints of harassment in the workplace was not lost on the Court. With respect to Bailey's retaliation claim, the evidence suggested that Taylor-Monachino discouraged the filing of complaints of harassment and actively undermined the remedial efforts of others by way of her authority.

*Bailey* clarifies the critical role played by human resources in promptly addressing workplace harassment, actively protecting employees from unlawful behavior, and ensuring compliance with the FEHA by maintaining a workplace free from discrimination and harassment. In engaging in conduct "antithetical to her duty as the HR manager," Taylor-Monachino's conduct "functioned as ratification of Larkin's use of a racial slur." (*Bailey*, *supra*, at p. 449). The ruling in *Bailey* confirms that abuses of power by human resource personnel can perpetuate a hostile work environment and result in employer liability under FEHA.

### Can *Bailey* be extended to single acts of harassment against other protected classes?

The ruling in *Bailey* – finding that a single racial epithet may create a hostile work environment – raises the question of whether the reasoning of *Bailey* can be extended to single acts of harassment targeting other protected classes under FEHA and Title VII. Although *Bailey* specifically addressed racial harassment, the Court's emphasis on the context and impact of a single act suggests that the same principle could extend to other protected characteristics. Moreover, the Court's recognition that offensiveness is a subjective assessment associated with the subgroup under attack (*McGinest v. GTE Service Corp*. (9th Cir. 2004) 360 F.3d 1103, 1116 [". . . comments or actions may appear . . . intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group"]) suggests that certain intrinsically offensive words or actions directed at these subgroups may also rise to the level of creating a hostile work environment.

The Supreme Court's contextual inquiry, with its renewed emphasis on the perspective of the protected class member, challenges prior rulings that dismissed isolated or single incidents as insufficiently severe or pervasive. For instance, in *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, the court held that a single act of harassment (a male coworker grabbing a female coworker's breast) did not create a hostile work environment. This decision invoked the false premise of a harmless, "one [liability-]free grab."

In *Bailey*, the plaintiff presented various forms of evidence demonstrating how the harassing conduct interfered with her ability to perform her job. By contrast, the plaintiff in *Brooks* conceded that the incident had no effect on her job performance. Additionally, while the City's response in *Bailey* was criticized for ratifying harassment and shielding the harasser, in *Brooks*, the City of San Mateo acted decisively by terminating the harasser and ultimately prosecuting him for felony assault.

Twenty-five years later, *Brooks* remains controversial as the "one free [breast] grab" case, reflecting frustration with the male-dominant courts' rigid application of the severe or pervasive standard to one-off misconduct. This approach overlooks a "reasonable" woman's perspective that a single physical violation can suffice and that she should not have to endure repeated or patterned behavior for the offense to be actionable. *Bailey* challenges this precedent by recognizing that the severity of certain acts, even if isolated, should be assessed in the context of their historical significance to the targeted class. Some might argue that, coupled with the physical nature of the offense, the second-class treatment of women has a historical and cultural resonance that warrants rejecting the concept of "one free [breast] grab."

*Bailey* may serve as a catalyst for rethinking how single acts of harassment are evaluated across other protected classes under FEHA and Title VII. Courts have been challenged with evaluating whether a single homophobic slur (e.g., "faggot" or "dyke") or a misogynistic remark in a male-dominated field (e.g.,"bitch") meets the threshold for creating a hostile work environment, thereby triggering employer liability. *Bailey* likely invites future litigation to address whether *Bailey*'s reasoning can be extended to other forms of discriminatory conduct, where the context and impact could render a single incident sufficiently severe to be actionable.

### Conclusion

In *Bailey v. San Francisco District Attorney's Office*, the Court resoundingly affirms that a single incident of harassment, particularly the use of the racial slur "N-word," even when uttered by a non-supervisor, can create a hostile

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work environment if it alters the terms, conditions or privileges of employment. The ruling underscores the importance of contextualizing the conduct and its impact in creating a hostile work environment. *Bailey* also highlights the dangerous consequences of human resource employees who ratify harassing conduct, rather than ensuring that the workplace remains free of discrimination and retaliation.

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