

Hostile Work Environments Come In Many Forms

By Rick Kaiser

When people think of hostile work environment claims, sexual harassment is generally the offense that comes to mind. However, employers need to be mindful that other forms of harassment, such as race, religion, national origin, or disability may also create a hostile work environment. The Ninth Circuit Court of Appeals recently reminded us of this in *McGinest v. GTE Service Corp.*, 360 F.3d 1103 (9th Cir, 2004), which involved allegations of a racially hostile work environment.

Reported Facts—McGinest was an African-American male who worked as a construction worker and relief supervisor for GTE, a telecommunications company. McGinest alleged that at least six supervisors and coworkers called him racial slurs and a “drug dealer,” among other things. He also alleged that racist graffiti constantly appeared on the men’s restroom walls. McGinest further alleged that this harassment, especially the graffiti, continued after he repeated complained about it.

McGinest initially reported his concern to GTE under its so-called “zero tolerance” anti-discrimination policy. However, the policy said nothing about the consequences for engaging in discriminatory conduct. The policy also did not detail reporting procedures for employees who experienced discrimination. The policy merely stated, “If you have questions concerning equal employment opportunity, discrimination, or affirmative action, discuss them with your supervisor or human resource representative.”

GTE’s response to McGinest’s allegations was dismal, according to the Ninth Circuit. Although aware of the offensive conduct, the company disciplined only one supervisor who had made the comments. The discipline consisted of a disciplinary memo and showing the offender a video on *sexual* harassment. GTE also responded to the racist graffiti by painting over it, but it soon reappeared. GTE’s limited response convinced McGinest to take up his allegations with a more receptive audience—the EEOC, which investigated the allegations and issued a finding that GTE had violated Title VII. McGinest then sued GTE under Title VII for among other things, creating a racially hostile work environment. The trial court dismissed McGinest’s claim after concluding that many of McGinest’s allegations were conclusory and not severe enough to affect the terms and conditions of his employment.

The Ninth Circuit Reinstates McGinest’s Lawsuit—McGinest appealed the trial court’s order dismissing his lawsuit. The Ninth Circuit agreed with McGinest. Reversing the trial court dismissal of the lawsuit, the Ninth Circuit noted that the alleged harassing conduct must be subjectively and objectively hostile to be actionable. While that is not new law, the court promulgated a new test for determining objective hostility.

In doing so, the Court borrowed from sexual harassment cases setting forth the “reasonable woman” test to measure whether conduct was objectively hostile, holding that objective hostility must be measured from the perspective of a reasonable person of the plaintiff’s protected class (an African-American in this case).

Noting that much of the alleged conduct was unduly insulting to African Americans, the Court also found that “code words” like “drug dealer” could be offensive to one group of people, but not another. The Court concluded that a “reasonable African-American” would find much of the alleged conduct hostile, and thus reinstated McGinest’s hostile work environment claim.

The Court also faulted GTE’s claim that it adequately responded to McGinest’s allegations because none of the alleged harasser employees continued their conduct after McGinest reported it. The Court noted that remedial actions must deter the harasser *and other potential harassers* from engaging in similar conduct. After reviewing McGinest’s allegations, which took place over a ten-year period, the Court quickly concluded that GTE’s response did not deter wrongful conduct from re-occurring and essentially ratified the harassing conduct.

What McGinest Means for Employers:

- ✓ Employers need to implement effective workplace policies that provide employees with specific ways to inform management of objectionable conduct.
- ✓ Employers need to promptly and thoroughly investigate and evaluate any allegations of alleged harassment.
- ✓ Employers should tailor their response to allegations of harassment by ensuring that it immediately stops the alleged conduct and deters other potential harassers from similar conduct.

This Employment Law Note is written to inform our clients and friends of developments in labor and employment relations law. It is not intended nor should it be used as a substitute for specific legal advice or opinions since legal counsel may be given only in response to inquiries regarding particular factual situations.



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