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The Sixth Circuit Maintains Title VII's High Burden of Proof in Hostile Work Environment Claims

By: Bruce A. Truex and Ashley Monticciolo **May 30, 2017**

Actionable claims under Title VII must be regarded as severe and pervasive, from both an objective and subjective standpoint. In *Phillips v. UAW International*, Case No. 01-94430 (6th Cir. April 12, 2017) Plaintiff failed to meet her burden of proof when pleading claims of hostile work environment under Title VII of the Civil Rights Act of 1964 and the Michigan Elliot-Larsen Civil Rights Act. To assess whether Plaintiff had met her burden of proof the Court cited *Nat'l R.R. Passenger Corp v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), in which the Supreme Court stated that to determine whether an actionable hostile work environment claim exists, courts must use a totality of circumstances approach. This includes looking at 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 elements required to establish a claim of hostile work environment under Title VII include proof that (1) plaintiff belongs to a protected class; (2) she was subject to unwelcome harassment; (3) the harassment was based on race; (4) the harassment affected a term, condition, or privilege of employment; and (5) the defendant knew or should have known about the harassment and failed to take action. In their analysis the Sixth Circuit focused primarily on the fourth element, whether the alleged harassment affected a term, condition or privilege of employment.

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In the aftermath of *Phillips* it is crucial to note that Title VII provides coverage only for incredibly offensive, *continuous* conduct. The Sixth Circuit has consistently upheld the idea that occasional inappropriate behavior does not meet the threshold of a hostile work environment claim. Even various blatant displays of racism were not determined to be severe or pervasive enough in *Phillips*. In the case of *Grace v. USCAR*, 521 F.3d 655 (6th Cir. 2008) the Sixth Circuit maintained that occasional offensive utterances do not rise to the required level of hostility, and holding otherwise would turn Title VII into a "code of workplace civility." This means that Title VII is not designed to resolve a few instances of inappropriate behavior, but rather put an end to the presence of continuous reprehensible actions. Employers should recognize that this high burden of proof will protect them from liability if they can establish that the conduct is not severe or pervasive enough to alter the terms and conditions of employment.

Plaintiff brought claims against the UAW and two of its officials for race discrimination based on a hostile work environment theory under Title VII and the corresponding Michigan statute. Plaintiff belonged to Local 7777, a UAW International affiliate where she alleged she was subject to a racially hostile work environment. She pointed to a number of instances of offensive conduct over the course of two years. These instances included a troublesome meeting where her superior asked the race of each individual who filed a grievance, and separated the grievances into piles based on whether they were filed by white union members or black union members. He then mentioned that he would be discarding the grievances made by black union members. Other general instances included him stating that there were "too many blacks" in the union, and using a condescending tone when speaking to black union members.

In reaching its holding in *Phillips*, the Sixth Circuit decided Plaintiff did not meet her burden of proof because the incidents were in fact isolated, and while they were certainly offensive they were not severe or pervasive enough to alter the terms and conditions of Plaintiff's employment. Historically, the Sixth Circuit has found offensive and bigoted conduct to be insufficient if it is not severe or pervasive enough. The Court admits that it is a very high bar to meet, and noted that several cases have been unable to do so.

We welcome your questions -

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