Race-based Workplace Harassment and Retaliation: The Employee’s Perspective

Debra S. Katz and Aaron D. Blacksberg

Katz, Marshall & Banks, LLP
1718 Connecticut Ave. NW
Sixth Floor
Washington, D.C. 20009
(202) 299-1140
www.kmblegal.com

1 Debra S. Katz is a founding partner with Katz, Marshall & Banks, LLP, a civil rights firm based in Washington, D.C., which specializes in the representation of plaintiffs in employment law, whistleblower, civil rights and civil liberties matters. Aaron D. Blacksberg is an associate with the firm.

Introduction

Racial justice issues have received much-deserved attention in recent years. Long-simmering issues including police brutality, racial profiling, and mass incarceration have captured public attention, through protests and through elections at all levels of government. Race-based harassment in the workplace has received relatively little attention, and this harassment continues to be disturbingly prevalent in 2017.

The U.S. Equal Employment Opportunity Commission (EEOC) has undertaken initiatives in recent years on the topics of both workplace harassment in general and racial discrimination and harassment in particular. The EEOC has published extensive quantitative and qualitative data on charges filed with the Commission and on cases in which the Commission has taken enforcement action. That data shows that the number of race discrimination charges has fluctuated from year to year, but overall has risen over the last 20 years, and remained the largest single category of charges over that time span. For its fiscal year 2015, the EEOC reported race-based harassment as the largest category of harassment charges among federal employees and the second largest category of harassment charges among all other employees. As part of the EEOC’s ongoing Eradicating Racism and Colorism from Employment (E-RACE) Initiative, the Commission publishes brief descriptions of a sampling of its enforcement actions in race discrimination cases. These cases are rife with examples of racial epithets and other race-based harassment including nooses and racist graffiti appearing in the workplace.

Our firm has seen an increase in egregious race-based harassment cases in the last year. As with the EEOC’s examples, we have seen an uptick in cases where coworkers and supervisors have engaged in race-based harassment and the employer has failed to take action in response to a harassed employee’s complaint. Or worse, the company has punished that employee. We have also seen cases involving discrimination and stereotyping of Muslim employees of Middle Eastern origin – with intersecting race, religion, and national origin discrimination. In each of these cases, the employees reported discriminatory harassment and their employers retaliated against them for doing so.

These examples show that a significant problem for affected employees is their employers’ responses to reports of harassment. When an employer fails to respond, or responds by punishing the employee making the report, that deters reporting in the first place. Many courts are coming to recognize the importance of protecting such reporting, even of a single incident, to incentivize harassed employees to come forward. A 2015 Fourth Circuit en banc case is one of the clearest signs of a shifting mindset on this issue: in Boyer-Liberto v. Fontainebleau Corp, 786 F.3d 264 (4th Cir. 2015), the court overruled circuit precedent to hold that reporting isolated incidents of race-based harassment can be considered protected activity for a retaliation claim.

This paper sets forth examples and reflections on the continuing pattern of race-based harassment in the workplace; it is not a comprehensive report or review of the law in this area. Rather, it is an effort to provide a view from a busy plaintiff-side employment firm that
represents employees who have suffered racial harassment in the workplace, in settings varying from construction sites to law firms. With that in mind, this paper first examines the EEOC’s recent studies and statistics on race discrimination and harassment in the workplace, as well as several cases from the EEOC’s reports on these topics. Next, the paper presents recent examples from our legal practice to bring particular focus on the race-based harassment we continue to see in our cases. This paper then discusses the Fourth Circuit’s 2015 doctrinal shift on retaliation to show how courts have viewed and should view protecting reporting of race-based harassment. This paper concludes with a brief examination of the broader political and societal environment, which we fear will only embolden further race-based harassment and discrimination in the workplace, and which demands employers not tolerate such harassment and discrimination.

**Statistical Context: EEOC Reports on Race Discrimination and Harassment**

Statistics and reporting from the EEOC provide helpful context on the frequency and severity of race-based harassment in the United States today. First, the EEOC’s overall charge statistics show that charges of race discrimination have increased slightly overall in the past 20 years, following a similar upward trend in the number of all charges.\(^1\) Taking a few points in time:

- In FY1997, there were 29,199 race-related charges (36.2%) out of 80,680 total charges.
- In FY2009, there were 33,579 race-related charges (36%) out of 93,277 total charges.
- In FY2016, there were 32,309 race-related charges (35.3%) out of 91,503 total charges.

These numbers reflect all race-related charges, which include charges of harassment and also other forms of racial discrimination. Notably, race discrimination charges increased between FY2015 and FY2016, after decreasing slightly each of the previous five years.

In June 2016, the EEOC released a report representing the culmination of a broad study on workplace harassment.\(^2\) According to the EEOC’s data on FY2015 harassment charges:

- For private employees or employees of state and local government, 34% of all harassment charges alleged race-based harassment, second only to sexual harassment charges at 45%.
- For federal employees, race-based harassment charges represented 36%, a plurality, of all federal employee harassment charges.

---

\(^1\) For the EEOC’s breakdown of the number of EEOC charges by type and year, see “Charge Statistics (Charges filed with the EEOC) FY 1997 Through FY 2016,” https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

\(^2\) For the information discussed here drawn from the EEOC harassment report, including the harassment charge data and the chart below, see Chai R. Feldblum & Victoria A. Lipnic, “Select Task Force on the Study of Harassment in the Workplace,” EEOC (June 2016) available at https://www.eeoc.gov/eeoac/task_force/harassment/report.cfm.
For race-based harassment charges, the percentages of all harassment charges were nearly identical in the federal and non-federal employment contexts. The EEOC’s data shows a similar trend for national origin- and religion-based harassment, but not for other forms of harassment, as shown in this chart in the EEOC report:

![Chart showing percentages of harassment charges by category in federal and non-federal sectors.]

In discussing race-based harassment, the EEOC report states: “Race-based and ethnicity-based harassment are significantly understudied. Most studies of race- and ethnicity-based discrimination fail to distinguish between harassment and other forms of discrimination, and hence we did not find any nationally representative surveys on such harassment per se.”

Though the issue is understudied, the EEOC publishes a sample list of enforcement cases involving race discrimination, including race-based harassment cases, as part of its ongoing E-RACE Initiative. The EEOC provides this resource to “illustrate some of the common, novel, systemic and emerging issues in the realm of race and color discrimination.” Below are highlights of several cases, drawn from the EEOC’s descriptions, involving race-based harassment:

- **EEOC v. Swissport Fueling, Inc., No. 2:10-cv-02101(GMS) (D. Ariz. Nov. 25, 2014):** suit against a fueling company based at the Phoenix Sky Harbor Airport, alleging that a manager referred to African employees as “monkeys” and frequently alluded to slavery in speaking with these employees, through statements like “You are lucky to be paid. A long time ago Blacks were doing this for free.” Employees reported the harassment, and according to the settlement summary filed with the court, “the abuse continued, and some of them were unfairly disciplined, fired, or constructively discharged.”

---


• **EEOC v. Holmes & Holmes Industrial, Inc., No. 2:10-CV-955 (D. Utah consent decree filed Apr. 12, 2013):** suit against a Utah construction company, alleging that a site supervisor referred to black employees as “n----rs or a variation of that word almost every time he spoke to them.” Employees also reported racist graffiti throughout the construction site. As part of settlement, the employer “committed to implement several affirmative steps to prevent and address race-based conduct on the worksite” including anti-harassment training, regular discussions about workplace harassment, and external oversight of the company’s anti-discrimination policies and any future discrimination complaints.

• **EEOC v. Ready Mix USA LLC, No. 2:09-cv-00923 (M.D. Ala. Feb. 3, 2012):** suit against an Alabama cement and concrete company, alleging that “[a] noose was displayed in the worksite, derogatory racial language, including references to the Ku Klux Klan, was used by a direct supervisor and manager and that race-based name calling occurred.” The company agreed to change procedures to ensure proper investigation of discrimination and retaliation complaints, and report those complaints to the EEOC.

These three examples are a sample of the hundreds of race discrimination cases the EEOC describes on its website. They are far from unique examples: a search of the list of cases yields over 20 cases involving nooses and over 50 cases involving racial epithets such as the N-word, “boy,” “monkey,” and other terms.

**Race-based Harassment and Retaliation Cases from Our Practice**

In our own practice, we have seen a significant uptick in cases involving disturbing facts similar to the EEOC’s recent race-based harassment enforcement actions. In each instance, an employee experienced severe race-based harassment and then reported the harassment only to face further harassment, unwarranted discipline, and in several cases, termination. These examples have been simplified and modified to remove any identifying information, but accurately reflect the general events that transpired.

Employee A, an African-American repairman, worked for a company for six years in a position that involved extensive physical labor. A colleague repeatedly called him the N-word, and physically harassed Employee A by purposely bumping into him while Employee A carried heavy equipment. Employee A reported this harassment to his supervisor, who told the harassing colleague to cease this behavior, but took no further disciplinary action when the colleague continued harassing Employee A. After one particular incident when the colleague almost seriously injured Employee A, Employee A again reported the colleague’s behavior, including his use of the N-word. Their supervisor then instructed the colleague to stay away from Employee A. The colleague ignored the instruction. Soon after, Employee A picked up a heavy tool in his truck while searching for some equipment. The colleague was nearby and reported Employee A for threatening him with the tool, when Employee A did nothing of the sort. Employee A provided an accurate account of what happened, and wrote up a summary to company management. Within hours of Employee A submitting this summary, the company
terminated him. In the termination meeting, the company’s owner accused Employee A of lying about the previous day’s incident and fabricating his reports of the colleague using the N-word.

Employee B, an African-American construction worker, began working at a construction site and immediately faced race-based harassment from his supervisor in the summer of 2016. Employee B’s supervisor singled him out for criticism and used racial epithets around him. A colleague also made racist comments to Employee B, and Employee B reported those comments to his supervisor. The supervisor blamed Employee B for being unable to get along with his colleague. Then, following the July 2016 shooting of five police officers in Dallas, Texas, the supervisor raged at Employee B about the news and called him a “monkey” and an “ape.” A week later, the supervisor visited the worksite and called Employee B the N-word and a “coon.” He then took out a knife and threatened Employee B with physical violence. Employee B reported the incident to a company security employee. That security employee told Employee B not to be bothered by the harassing supervisor’s behavior, and took no further action. The next day, the supervisor again threatened Employee B with a knife, again referenced the Dallas shooting, and said that the country would be different once Donald Trump became President. Employee B reported these incidents to a different supervisor, who became angry at Employee B for reporting the earlier incident to a security employee, and then said he would investigate. That supervisor met with Employee B the next day and said there was no evidence for Employee B’s report. He then told Employee B that Employee B was terminated, effectively immediately, for being late to work that day. Employee B had not shown up late that day.

Employee C, a Muslim service industry worker of Middle Eastern origin, faced harassment on the basis of his religion and national origin. Employee C was highly successful in his work and worked for his company for many years. Recently, several colleagues and supervisors began to direct racial epithets at him. Several employees called Employee C a terrorist, a “bomber,” and suggested he was a member of ISIS or the Taliban. A few colleagues mocked his religious observance during the month of Ramadan. Employee C reached out to the owner of the company and described to him these remarks and the fact that his supervisors failed to remedy, and at times encouraged, this treatment. The owner told Employee C’s supervisor about Employee C’s complaint, and the supervisor in turn said to employee C that he would face the consequences of speaking to the owner about the issue. The supervisor falsely accused Employee C of bullying another employee and suspended Employee C. Employee C spoke to the owner again, who promised to take action and never did. Employee C’s supervisor continued his verbal abuse of Employee C. Employee C reported slurs based on his skin color, his religion, and his country of origin, and his company did nothing in response. Employee C retained our firm, and we reached out to the company in an attempt to resolve Employee C’s matter and remedy the harassment taking place. In response, the company stated that it would investigate the matter, then terminated Employee C with no explanation. After much prompting, the company fabricated allegations against Employee C to justify its decision.

Each of these situations involves race-based and other forms of harassment, as well as retaliation for reporting that harassment. In these cases and others in our practice, we have found that employers are unwilling to believe employees who report harassment and often retaliate.
against them for insisting that action be taken. We also see situations where the employer condones or even participates in harassing the employee – in another recent case, a top company executive forced our client to listen to a racially offensive song (while the executive repeated the offensive lyrics and pointed at our client) at a work event, over our client’s vocal objections, with the company’s head of human resources and other management standing close by. The fact that someone has come to our firm usually means that internal company mechanisms for resolving these problems, if those mechanisms exist at all, have failed. Even when we become involved in these situations and attempt to resolve the matter privately, some companies still refuse to investigate or take steps to remedy harassing and retaliatory behavior. Or, as in the case of Employee C, the employer further retaliates against the employee in response to the employee’s retention of counsel. An employer’s failure to address the issue internally before a termination, or privately through negotiation, often leaves an employee with no other choice but to suffer quietly or to file a charge with the EEOC or other fair employment practices agency.

When employees come to us in the midst of a racial harassment situation, we advise them to carefully and thoroughly document incidents of harassment. It is important for employees to keep a contemporaneous account of both the racial harassment itself as well as whatever steps their employer takes, if any, to investigate or otherwise address racial harassment complaints. Employees should carefully document these issues to provide a thorough report to the company and, as is often necessary, to support a legal claim if the employer fails to address the issue and engages in retaliation. Indeed, increasingly, clients come to us having already recorded audio or video of such incidents or photographed the evidence. We also hear frequently from clients that they did not even consider reporting harassment for a simple reason: there is no point. Many have heard stories, like those of Employees A, B, and C, where the company does nothing or employees are fired in retaliation for reporting harassment, so they stay quiet. With the risk of retaliation in mind, it is especially important for employees to be well-informed about their employer’s policies for reporting racial harassment complaints and to avail themselves of those avenues. Companies should promulgate policies that define what behavior constitutes racial harassment with the same level of detail as they typically do with sexual harassment policies. They should also provide training and make clear that racial harassment is prohibited in the workplace.

**Retaliation Case Law in the Fourth Circuit: Jordan to Boyer-Liberto**

One impetus for employers to comply with their legal obligations is the knowledge that courts will take an appropriately broad view of what kind of reporting constitutes protected activity. In a May 2015 decision, the en banc Fourth Circuit Court of Appeals overruled its own precedent and held that reporting a single incident of race-based harassment can constitute protected activity for a Title VII retaliation claim. This case, *Boyer-Liberto v. Fontainebleau Corp.*,\(^5\) was an important doctrinal shift, protecting employees who report discriminatory harassment before it rises to the severe and pervasive level that constitutes a hostile work environment.

\(^5\) 786 F.3d 264 (4th Cir. 2015).
In Boyer-Liberto, Reya Boyer-Liberto, an African-American woman who worked as a waitress at a hotel in Ocean City, Maryland, reported an incident to hotel management in which her white supervisor harassed her with threats and a racial epithet. Liberto’s supervisor confronted Liberto because the supervisor believed that Liberto had ignored her.\(^6\) The supervisor then followed Liberto, threatened to “get” her and make her regret her actions, and called Liberto a “porch monkey.”\(^7\) The next day, the supervisor called Liberto “little girl” and again called her a “porch monkey.”\(^8\) Two days after that, Liberto reported the incident to the company Human Resources Director and said she had been harassed on the basis of her race.\(^9\) The company issued a reprimand to the supervisor, and terminated Liberto less than a week later, ostensibly for performance reasons.\(^10\)

The en banc court held that Liberto’s report of these isolated incidents could constitute protected activity, even if the underlying conduct was not yet an actionable hostile work environment, stating:\(^{11}\)

> [W]e underscore the Supreme Court’s pronouncement in [Faragher v. City of Boca Raton] that an isolated incident of harassment, if extremely serious, can create a hostile work environment. We also recognize that an employee is protected from retaliation when she reports an isolated incident of harassment that is physically threatening or humiliating, even if a hostile work environment is not engendered by that incident alone.

With this holding, the court overruled a prior decision, Jordan v. Alternative Res. Corp., in which the court held that reporting an “isolated racial slur” was not protected activity for the purposes of a Title VII retaliation claim.\(^{12}\) In Jordan, the plaintiff, Robert Jordan, saw a colleague watching a news report of the 2002 D.C.-area sniper shootings perpetrated by two African-American men, and heard the colleague say “they should put those two black monkeys in a cage” and that “black apes” should then molest the shooters.\(^{13}\) Jordan reported these comments to company management, and he was fired a month later, with several vague

\(^{6}\) Id. at 269-270.

\(^{7}\) Id. at 270.

\(^{8}\) Id.

\(^{9}\) Id.

\(^{10}\) Id.

\(^{11}\) Id. at 268.

\(^{12}\) 458 F.3d 322, 342 (4th Cir. 2006).

\(^{13}\) Id. at 335.
explanations for the decision. The court dismissed the plaintiff’s claim on the grounds that reporting this single incident was not protected activity, and the court stated that “Jordan’s argument that [this holding] creates a perverse incentive for employers to fire workers quickly before they have [Title VII] claims is hyperbolic.”

In our experience representing employees who have faced harassment and retaliation, Jordan’s argument was anything but “hyperbolic.” Despite the legal protections of Title VII and similar state and local laws, employers deter employees from reporting harassment by taking no action or by taking retaliatory action in response to those reports. As the court noted in Boyer-Liberto, the remedial purposes of Title VII require protecting employees trying to put a stop to discriminatory harassment when that harassment begins:

Jordan . . . did exactly what Title VII hopes and expects: He reported the comment to his employers in an effort to avert any further racial harassment. Because of his internal complaint, however, Jordan was fired. In light of the text and purpose of Title VII, as well as controlling Supreme Court and Fourth Circuit decisions, Jordan surely merited protection from retaliation.

The Boyer-Liberto standard is a welcome and important shift in Fourth Circuit law, and provides a model for how courts should view protected activity in the context of reporting harassment. As that court noted, these protections provide necessary, though unfortunately often insufficient, incentives to employers who would otherwise ignore or encourage workplace harassment.

America in 2017: Continuing and Emboldened Discrimination

Looking ahead in 2017 and beyond, there are disturbing trends in American society that could impact discriminatory harassment in the workplace. Since the start of the 2016 election campaign, and particularly since the election itself, hate groups and hate crimes have increased at an alarming rate in the United States. The Southern Poverty Law Center (SPLC) tracks statistics around hate groups, and reports a “near-tripling of anti-Muslim hate groups” since 2015, from 34 to 101. A news report on one anti-Jewish and anti-Muslim group, Church Militant, quoted the group’s leader: “The enthusiasm level has really taken off in this last year . . . . It’s really off the

---

14 Id.
15 Id. at 343 (internal quotation omitted).
16 786 F.3d at 283.
That report also discussed a recent murder of an Indian man in Kansas where the murderer yelled, “get out of my country”; threatening letters to American mosques; and vandalism of multiple Jewish cemeteries. In the same article, a leader of a secessionist organization, designated a hate group by the SPLC, stated, “What you’re seeing now is that a lot of people feel more emboldened – because someone like Trump is in the White House – to speak their minds on topics that formerly had been taboo.”

The issues in this reporting, coupled with already rising tensions around political issues like immigration and racial justice, have manifested in the workplace. The cases of Employee B and Employee C discussed above show how workplace harassment in this age can attack intersecting identities – for Employee B, political and racial identities; for Employee C, religious, national, ethnic, and racial identities. Reports of race-based harassment continue to show up regularly in the news, including nooses and racist graffiti appearing at worksites in Washington, D.C. and elsewhere late last year.

In addition, employees and employers (as well as courts) will grapple with increasingly intersectional issues, such as discrimination based on both race and politics. In two recent incidents, employees were fired for showing solidarity with Black Lives Matter – in one case, a Florida public defender wearing a tie; in the other, a California school teacher wearing a pin. While federal law and state laws in most states do not prohibit discrimination on the basis of political belief or affiliation – with some notable exceptions, including in Washington D.C. under D.C. law, D.C. Code § 2-1402.11, and in the federal government under the Civil Service Reform Act of 1978, 5 U.S.C. § 2301(b) – the intersecting nature of politics and race will continue to have implications for employment decisions everywhere, particularly in the current political climate.


19 Id.

20 Id.


Bearing in mind the intersectional nature of race and politics, it is unrealistic to expect employers to prevent conversations touching on these issues from happening in the workplace. Recent surveys of employers have shown that the election has led to a general increase in “tension, hostility, and arguments among co-workers,” and employers should take this moment to revisit or create clear diversity and inclusion policies, as well as guidelines for talking about politics at work.\footnote{Patrice Borders, “ Civility in a Post-Election Workplace,” MWH LAW GROUP (Jan. 31, 2017), http://mwhlawgroup.com/civility-post-election-workplace/.} In maintaining a healthy work environment that involves political discussion, it is also important for employers to foster productive conversations about racial issues in an ongoing, proactive manner rather than waiting for problems like workplace harassment to force those conversations.\footnote{See Kira Hudson Banks, “How Managers Can Promote Healthy Discussions About Race,” HARV. BUS. REV. (Jan. 7, 2016), https://hbr.org/2016/01/how-managers-can-promote-healthy-discussions-about-race.} At the same time, employers must ensure they have strong anti-discrimination, anti-harassment, and anti-retaliation policies in place, and actively and consistently enforce them.

Race-based harassment and related harassment based on religion, national origin, and other intersecting identities continue at an alarming rate and in alarming fashion in 2017. The EEOC’s data shows that race-related charges have increased over recent decades, even before the recent increase in hate groups and hate crimes that have likely emboldened lesser discriminatory acts. The fact that those charges increased in 2016 after slight decreases in previous years may be the start of a trend that employers should take seriously. Employees must be able to go to work with the knowledge that their employers will not tolerate race-based and other discriminatory harassment in the workplace, and that means having strong reporting procedures and effective anti-retaliation policies. As the Fourth Circuit’s \textit{Boyer-Liberto} decision shows, employers should institute these practices because the policies and purpose of Title VII and similar state laws require them to do so. Given the current social and political climate, employers, now more than ever, need to live up to their responsibility to their employees and to society.