

In The
United States Court of Appeals
For The Fourth Circuit

ROBERT L. JORDAN,

Plaintiff – Appellant,

v.

**ALTERNATIVE RESOURCES CORPORATION;
INTERNATIONAL BUSINESS MACHINES CORPORATION,**

Defendants – Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT GREENBELT**

**BRIEF OF AMICI CURIAE
METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION
AND THE PUBLIC JUSTICE CENTER
IN SUPPORT OF APPELLANT ROBERT L. JORDAN**

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Fed. R. App. P. 292

I. STATEMENT OF IDENTITY, INTEREST IN CASE AND SOURCE OF AUTHORITY TO FILE OF AMICI CURIAE

The **Metropolitan Washington Employment Lawyers Association** (MWELA) is a legal membership organization with over 220 members who represent plaintiffs in employment and civil rights litigation in the Washington area. MWELA has participated as an *amicus curiae* in the following recent cases: Lively v. Flexible Packaging Ass'n, 830 A.2d 874 (D.C. 2003); Hollins v. Fed. Nat'l Mortgage Ass'n, 760 A.2d 563 (D.C. 2000); Barbour v. Washington Metro. Area Transit Auth., No. 03-7044 (D.C. Cir.); MacIntosh v. Bldg. Owners and Managers Ass'n Int'l, 355 F. Supp. 2d 223 (D.D.C. 2005); Lance v. United Mine Workers of Am. 1974 Pension Trust, No. 04-746 (D.D.C.); Manor Country Club v. Flaa, ___ A.2d ___, 2005 WL 1159433 (Md. May 18, 2005); Towson Univ. v. Conte, 376 Md. 543, 831 A.2d 3 (2003); and Friolo v. Frankel, 373 Md. 501, 819 A.2d 354 (2003). At the heart of this appeal is the potential vindication of employees' rights pursuant to federal and state antidiscrimination statutes to report workplace discrimination without fear of retaliation. Because the outcome of this case will directly impact future client representation, MWELA members have a concerted interest in the fair resolution of the issues on appeal.

The **Public Justice Center**, a non-profit civil rights and anti-poverty legal services organization founded in 1985, has a longstanding commitment to ensuring that persons harmed by discrimination in the workplace are not denied a judicial

remedy. PJC's programs include its Appellate Advocacy Project, which seeks to improve the representation of indigent and disadvantaged persons and their interests before state and federal appellate courts. The Appellate Advocacy Project has submitted or joined in briefs of *amicus curiae* in recent cases involving claims of employment discrimination. See, e.g., Ocheltree v. Scollon Prods., Inc., 335 F.3d 325 (4th Cir. 2003); Edwards Sys. Tech. v. Corbin, 379 Md. 278, 841 A.2d 845 (2004); Shabazz v. Bob Evans Farms, Inc., No. 03-976 (Md. Ct. Spec. App. filed July 23, 2003). PJC has an interest in this case because an overly narrow approach to retaliation claims under Title VII, section 1981, and the Montgomery County Code would leave persons who report workplace discrimination without a remedy against retaliatory responses by their employers.

Amici are authorized to file this brief pursuant to Fed. R. App. P. 29.

II. STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

Amici file this brief in support of the plaintiff, Robert Jordan. We urge the Court to reverse the District Court's decision dismissing Mr. Jordan's case on the grounds that his conduct was not protected from retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 1981 and Article 1, § 27-19 of the Montgomery County Code. The decision misreads the law and will have a negative impact on employees who report workplace

discrimination to their employers, as well as on employers who wish to correct such violations.

Jordan was fired because he filed complaints with the defendants, his employers, about offensive racial remarks from a co-worker. The co-worker referred to black men as monkeys. He also had a history of similar conduct. Jordan reasonably believed that the remarks and conduct of this employee were contributing to a discriminatory work environment. Jordan's complaints were thus protected by Title VII, § 1981, and the Montgomery County discrimination laws.

Title VII both encourages and, in some cases, requires employees to file harassment complaints with their employers at the earliest possible time. The District Court decision endorses a standard that would place employees who do so in a completely untenable position. They could follow the legally required directives for complaining about workplace harassment, yet be fired in retaliation and left without legal recourse. If not reversed, the decision will inevitably result in chilling employees who suffer workplace discrimination from asserting their legal rights. Employers too will be harmed; employees will have little incentive to come forward to assist their employers in stopping workplace harassment before it becomes the basis for a lawsuit.

This is not only obviously unfair, but also makes it impossible for employment lawyers to advise their clients appropriately about their rights and

obligations in the workplace. Under the District Court's decision, an employee who files an internal complaint with his employer does so at his peril. If the employee files a complaint too early, that is before the conduct rose to the level of a hostile work environment, the employee is not protected from retaliation. If the employee files too late, the employer can successfully claim that the employee failed to provide prompt notice of the harassment, thus barring any recovery for the employee. Faced with such a situation, it will be impossible for employment lawyers to provide their clients with intelligent advice as to how to proceed. The unrepresented, as most are when they first file employer complaints, will be completely lost.

To correct these anomalies, the amici urge this Court to adopt a different analysis for protecting employees who complain about harassment. The Court must hold that such employees only need to have a reasonable belief that the conduct they are complaining about, if left unchecked, would lead to a hostile work environment. They should not be required to prove that the work environment had already become hostile. This Court should reverse the District Court's decision that held otherwise.

III. STATEMENT OF FACTS

The plaintiff in this case, Robert Jordan, is an African American. On October 23, 2002, Jordan heard a co-worker, Jay Farjah, make remarks that were racially offensive to him. [JA 81, ¶ 9] Referring to two black men who were later convicted

of murdering several people in the metropolitan Washington area, Farjah said: “They should put those two black monkeys in a cage with a bunch of black apes and let the apes fuck them.” [JA 81, ¶ 9].

At least two co-workers told Jordan that they had heard Farjah make similar offensive comments many times before. [JA 81, ¶ 10.] Based on this information, Jordan believed that Farjah’s comment had given rise to, or, if left uncorrected, would give rise to, a hostile work environment. [JA 81, ¶11.]

Both ARC and IBM had policies that require employees to report to management any conduct that the employees perceive to be discriminatory. [JA 81, ¶11; JA 193-95 (Policies 3.3.1.1 and .2, at 8-9)] On the same day, Jordan immediately complained about Farjah's remarks to two of his supervisors with the defendant, International Business Machines Corporation (IBM). [JA 81-82, ¶¶ 11-14]

Jordan later put his complaint in writing, and pursued it with a manager with the defendant, Alternative Resources Corporation (ARC). [JA 81-82, ¶¶ 11-14] Less than one month after the initial incident, on November 21, 2002, ARC fired Jordan at IBM’s direction, because of Jordan’s opposition to Farjah’s racially offensive comment. [JA 83, ¶¶ 19-20]

IV. ARGUMENT

The District Court Erred As a Matter of Law In Concluding that Jordan's Complaint Did Not State a Cause of Action for Unlawful Retaliation.

A. The District Court's decision conflicts with Title VII law and policy that prohibits retaliation against employees who promptly report offensive racial remarks before they arise to workplace harassment

The U.S. Supreme Court has interpreted Title VII's ban on retaliation to provide the broadest possible protections for employees who complain about workplace discrimination. In Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997), the Court described the purpose of Section 704(a) (the anti-retaliation provision) of Title VII as: "maintaining unfettered access to statutory remedial mechanisms." ¹ For this reason, "it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII." Id. Thus, the Court interpreted Title VII's provisions to protect even former employees from retaliation for engaging in protected activity. Id.

The Supreme Court issued a similar decision this term. The Court held that the broad prohibition of sex discrimination in Title IX of the Education Amendments of 1972 (20 USC §§ 1681-1688) bars retaliation against a person for complaining about sex discrimination. The Court observed that "if retaliation were

¹ Section 704(a) of Title VII makes it unlawful for an employer "to discriminate against any of his employees . . . because he has "opposed any practice made . . . unlawful" by Title VII. 42 U.S.C. § 2000e-3(a).

not prohibited, Title IX's enforcement scheme would unravel," because "individuals who witness discrimination would be loathe to report it." Jackson v. Birmingham Bd. of Educ., __U.S.__, 125 S. Ct. 1497, 1508 (2005). In sum, the statute's objective of protecting individuals from discriminatory practices "would be difficult, if not impossible, to achieve if persons who complain about [] discrimination did not have effective protection against retaliation." Id. (quoting Brief for United States as *Amicus Curiae* at 13). The same observations hold true for Title VII, section 1981, and Article 1, § 27-19 of the Montgomery County Code: if employers are allowed to retaliate with impunity against employees complaining of discrimination, then employees will not report discrimination and the purposes of these statutes will be undermined.

Reporting discriminatory practices to employers is especially important where there is conduct that could evolve into workplace harassment such as occurred in this case. Employees who are subjected to such conduct are required to report it as early as possible, so that the employer can respond swiftly and appropriately before it worsens into full blown harassment.

In Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), the U.S. Supreme Court added this requirement to Title VII hostile work environment claims by establishing an affirmative defense for employers. The defense shields employers from liability for workplace harassment where they can prove that they

had reasonable rules to prevent and correct harassment and that the employee in question had failed to take advantage of these rules. See Id. at 765.

The Court added that the best way for the employer to succeed in this affirmative defense was to establish an internal complaint procedure. Id. An employee's failure to file a prompt complaint addressing the alleged harassment would then serve as strong evidence in the employer's favor in proving the defense. Id.

The Court in Ellerth endorsed these rules based on its recognition that “Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. . .” and it was “Congress' intention to promote conciliation rather than litigation in the Title VII context.” Id. at 764. The Court also observed that: “encourag[ing] employees to report harassing conduct before it becomes severe or pervasive . . . would also serve Title VII's deterrent purpose.” Id. (emphasis added).

After Ellerth, filing informal complaints with the employer as a means of reporting workplace harassment became almost an absolute necessity to perfect a subsequent cause of action for hostile work environment. The courts have routinely dismissed harassment cases against employers for employees who have failed to do so. See Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 265-66 (4th Cir. 2001) (affirming summary judgment for employer, where employee did not report three months of ongoing harassment); see also McPherson v. City of

Waukegan, 379 F.3d 430, 441-42 (7th Cir. 2004) (same, where employee did not report two instances of harassment until six days after the first incident and one day after the second incident); Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1289-90 (11th Cir. 2003) (same, where employee filed complaint only five days after last date of harassment but several months after first alleged incident of harassment). Indeed, “any evidence” that an employee has failed to use an employer’s complaint system to address alleged workplace harassment ordinarily will suffice to establish the employer’s affirmative defense. Lissau v. S. Food Serv., Inc., 159 F.3d 177, 182 (4th Cir. 1998).

Moreover, employees must report each incident of harassing conduct immediately after it occurs in order to avoid losing their right to bring a future claim for workplace harassment. When employees wait until several harassing incidents have occurred to make a report, the employer will not be liable for those initial incidents that were not reported immediately. See, e.g., Moisant v. Air Midwest, Inc., 291 F.3d 1028 (8th Cir. 2002) (limiting employer’s liability to two most recent incidents of harassment, where employee failed to complain about prior incident).

Thus, under Title VII harassment law, employees have a special obligation, in fact a duty, to report possible harassing conduct whenever they believe it takes place. Courts applying the Ellerth affirmative defense have held that this duty to

report cannot be trumped by fears of retaliation. See Matvia, 259 F.3d at 270; see also Walton, 347 F.3d at 1290-91.

An employee has a duty under Ellerth to alert the employer to any allegedly hostile environment and “an employee's subjective fears of confrontation, unpleasantness[] or retaliation do not alleviate the employee's duty under Ellerth to alert the employer to the allegedly hostile environment.”

Williams v. Missouri Dep't of Mental Health, 407 F.3d 972, 977 (8th Cir. 2005) (quoting Shaw v. AutoZone, Inc., 180 F.3d 806, 813 (7th Cir. 1999)). Employees who report workplace harassment are expected to rely on the statutory prohibitions against retaliation for protection. See Matvia, 259 F.3d at 270. Because of this special duty to report harassing conduct, employees who make such reports should be provided with the broadest possible protections against retaliation.

It is precisely these policies behind Title VII—encouraging early reporting and resolution of workplace harassment “before it becomes severe or pervasive” (Ellerth, 524 U.S. at 764)—that are threatened by the District Court’s decision in this case. Jordan's complaints were consistent with these policies, providing the defendants with notice of Farjah's conduct and a chance to correct it before it created a hostile work environment.

Even if Farjah's conduct had not yet created such a hostile environment, Jordan had a legal right to file his complaints if only to ensure that Farjah's conduct

would not create one in the future. The Supreme Court in Ellerth specifically sanctioned the filing of harassment complaints for this purpose.

Viewed in this light, Jordan's complaints had to be reasonable because they were filed for this valid purpose. The District Court's failure to protect Jordan from retaliation would have an obvious negative impact on all employees who are subjected to discrimination in the workplace. In conflict with the policies behind Title VII and the rules established by the Supreme Court in Ellerth, these employees would be chilled from exercising their right and duty to complain about harassing conduct.

Amici submit that, should the Court follow the District Court's decision, it would place all employees who face workplace harassment on the horns of an insoluble dilemma. On the one hand, they would be required to file complaints of harassment as soon as possible in order to provide their employers with notice of the problems and a chance to correct them. If they filed a fraction too late, the employees would lose their cause of action. On the other hand, if the employees filed their complaint a fraction too early, they would have neither a cause of action for discrimination nor a chance to protect themselves from retaliation.

Faced with such a situation, it would be almost impossible for employment lawyers to advise their clients intelligently. Are we now supposed to count the racially offensive comments until we believe there are enough to file a complaint?

How many are enough? There are no answers to such questions. Workplace harassment cannot be quantified in such terms.² Yet, if we employment lawyers guess wrong, then we expose our clients to retaliatory actions against which there are no protections. Placing employees in this situation may provide essential material for a great satiric novel (Catch 22), but it is unacceptable in a judicial system that abides by sound principles of law, justice and fair play.

Moreover, affirming the District Court's decision would not even be good policy for employers. It would remove an employee's incentive to assist his employer in stopping workplace harassment before the employer was sued. For these reasons alone, the Court should reverse the District Court's decision.

B. The District Court erroneously required Jordan to prove that the defendants had subjected him to a hostile work environment.

It is settled law that to prove retaliation under § 704(a), a plaintiff does not have to prove that the employer had actually committed a discriminatory employment practice. The plaintiff only needs to show that he/she had a reasonable belief that the employer was engaged in unlawful employment practices. See Kralowec v. Prince George's County, 503 F. Supp. 985, 1008 (D.

² “[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These 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.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

Md. 1980), aff'd, 679 F.2d 883 (4th Cir. 1982), citing Ross v. Communications Satellite Corp., 758 F.2d 355, 357, n.1 (4th Cir. 1985). “[T]o show ‘protected activity,’” in a Title VII retaliation case, the plaintiff need “only ... prove that he opposed an unlawful employment practice which he reasonably believed had occurred or was occurring.” Peters v. Jenney, 327 F.3d 307, 320-21 (4th Cir. 2003).³ For the same reason, an employee who proceeds with a harassment complaint under an employer's anti-harassment policy need not prove all the legal elements of a hostile work environment in order to be protected from subsequent retaliation by the employer.

The District Court's decision ignored this established precedent. The decision focused almost exclusively on whether Jordan had a viable independent claim for racial harassment rather than on whether Jordan had a reasonable basis to file his harassment complaints. In doing so, the Court subjected Jordan's

³ An example in which a plaintiff's belief that an unlawful employment practice was occurring was held unreasonable is Clark County School District v. Breeden, 532 U.S. 268 (2001) (per curiam). In that case, Breeden, a female employee, filed an informal sex harassment complaint with her employer about a trivial sexual joke, relayed indirectly in a written psychological evaluation of another employee. Breeden admitted that the joke did not upset her at the time. In contrast to Jordan, Breeden did not complain that she was offended because she had been subjected to outrageously sexist comments; nor did she complain that those comments were widespread. Not surprisingly, the Court concluded that Breeden's complaint was not protected by Title VII. The complaint simply was not based on enough objectively reasonable facts that a hostile work environment existed or had the potential to exist.

complaints to the scrutiny normally reserved for a direct claim of racial harassment.

Under the Court's reasoning, Jordan was required to prove the merits of his original claim of racial harassment as a prerequisite to filing a claim of retaliation. This is not, and never has been, the law. See Peters, 327 F.3d at 320-21; Ross, 759 F.2d at 357, n.1.

The Court viewed Jordan's actions through the eyes of someone adjudicating the merits of a hostile work environment claim rather than through the eyes of an ordinary employee who was exposed to racially offensive remarks. Determining the reasonableness of a racial harassment complaint, even under an objective standard, calls for a different analysis.

The Court should have looked at the severity of the racial remarks themselves and their effect on Jordan, rather than whether the conduct met the strict definition of harassment. The Fourth Circuit has recognized that calling an African American a monkey, as Farjah did in the instant case, is a racial epithet that is “degrading and humiliating in the extreme.” Spriggs v. Diamond Auto Glass, 242 F.3d 179, 185 (4th Cir. 2001). Adding further insult, Farjah also expressed a wish that these black men be sexually assaulted. Given the racially charged and disgusting nature of the comments, it was objectively reasonable for

Jordan to believe that this conduct was contributing to an unlawfully discriminatory work environment.

The Court engaged in the same illogic when it discounted the fact that Farjah had made several similar comments in the past. Hostile work environment claims are different in kind from discrete acts. Because their very nature involves repeated conduct, the "unlawful employment practice," as set forth in Section 706 of Title VII, 42 U.S.C. § 2000e-5(e)(1), does not occur on any particular day. Instead, it occurs over a series of days or even years. See National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 103 (2002). In examining a claim of workplace harassment, the courts may look at all acts that contributed to a hostile work environment, including incidents that occurred outside of the statutory period and incidents that occurred after the employee filed a complaint. See id. at 117. Thus the “practice” Jordan was opposing—offensive racist comments in the workplace—need not have been actionable on the particular day he complained.

Moreover, this Court has concluded that discriminatory comments heard by other employees can be evidence that establishes an overall hostile environment. See Fox v. Gen. Motors Corp., 247 F.3d 169, 179 (4th Cir. 2001) (relying on evidence of harassment of other employees with disabilities to support jury verdict on hostile work environment claim); Conner v. Schrader-Bridgeport Int’l, Inc., 227 F.3d 179, 200 (4th Cir. 2000) (noting that the fact that two other employees also

experienced similar treatment is supportive of a plaintiff's harassment claim). See also Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997). This fact enhances the reasonableness of Jordan's belief that Farjah's conduct was contributing to a racially charged work environment, even if, as the District Court held, they were not strong enough on their own to support a harassment claim.

Viewed under these standards, there is no question that Jordan reasonably believed that Farjah's conduct toward other employees, as well as Farjah's remarks to him, showed a larger pattern of discrimination. Further, the remarks and other conduct were so that racially offensive that, if not soon corrected, they would become actionable harassment.

Because of Farjah's racist and vulgar comments and his past history of making such comments, Robert Jordan had a legal right to file his complaints about Farjah's racism with his employers, even if Farjah's conduct had not yet created a hostile work environment. Had these employers followed their own policies, [JA 193-95 (Policies 3.3.1.1 and .2, at 8-9)] not to mention sound principles of law, justice and fair play, they should have protected Mr. Jordan's job. Instead they did the opposite and, with the approval of the District Court, denied Mr. Jordan his rights under federal and state law.

V. **CONCLUSION**

For all the foregoing reasons, the Court should affirm the appeal and order the District Court to vacate its decision to dismiss the Complaint.

Respectfully submitted,

The Metropolitan Washington Employment
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