

Appellate Court Rules Harassment Does not Violate Civil Rights Act Unless Overtly Sexual or Racial

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The Bulletin

While the U.S. Court of Appeals for the Sixth Circuit has issued many pro-employee opinions in recent years, employers scored a victory in *Pusey v United Parcel Service, Inc.* where the court re-emphasized that not all workplace harassment is actionable.

Specifically, Paula Pusey, a white female, began working for UPS in 1988 as an aircraft mechanic. She claimed that, beginning in September 2005, James Carter, an African American coworker with a history of inappropriate behavior, began harassing and intimidating her. Pusey had previously witnessed Carter being rude and unprofessional toward another female employee and had heard that he had harassed other women, including blocking the path of one and “elbowing” another.

In September 2005, Pusey found Carter using her computer, and he refused to leave when asked. Shortly after that incident, he lunged at Pusey and hit her in her breast with his elbow. While Pusey fell backwards, she was able to avoid hitting the ground by grabbing a chair. When asked for an apology, Carter snickered. The rest of the day, Carter pretended that he was going to lunge at Pusey when she walked by. Pusey reported the incident and UPS suspended Carter for 30 days without pay.

After he returned from his suspension, Carter allegedly laughed, grunted and whistled at Pusey when she walked by. He also commented that “no one can touch me” and “it’s a good day to be a black man.” Pusey complained, and Carter was told to stay away from her. After further complaints, Carter’s work scheduled was adjusted so it would not overlap with Pusey’s, and he was told to stay 50 feet away from her.

Pusey eventually worked overtime and had further contact with Carter. On one occasion, Carter repeatedly approached her, looked her in the face and laughed. On other occasions, he stared at her, and once, threatened another employee in her presence saying the next time he saw that person in his end of town he would run him over. After he made the threat, he looked at Pusey. The problems continued, and eventually, Pusey was denied overtime so that she would not have contact with Carter.

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Pusey filed a complaint under Kentucky law claiming, among other things, hostile work environment based on race or sex. The federal district court dismissed the case and Pusey appealed. The Sixth Circuit Court of Appeals affirmed the dismissal analyzing the claims under Title VII, the federal counterpart to Kentucky's civil rights law.

To prevent dismissal, Pusey needed evidence to show that the harassment was “**overtly racial or sexual in nature**” or she had to establish that “**but for the fact of her sex [or race], she would not have been the object of the harassment.**” As explained below, Pusey's evidence was insufficient to meet these standards.

To show the harassment was based on race, Pusey relied on Carter's statement that “it was a good day to be a black man” and his grunting. The Sixth Circuit rejected her proofs saying that statements of racial pride do not reflect an unlawful animus toward another race, and there was no evidence (as Pusey argued) that Carter's grunting was intended to mimic animal sounds in order to draw upon a 20th Century stereotype portraying African American males as predatory animals who preyed on white women.

To support her claim of harassment based on sex, Pusey relied on Carter elbowing her in the breast, which in her view, is a “sexual area.” While agreeing that this was an act of aggression, the court did not view it as sexual in nature.

In short, Pusey presented evidence of harassment, but not harassment based on sex or race. Without such evidence, the harassment did not violate the civil rights act.

This case is important to the defense of such claims given the standards of prove set forth by the court. However, this case may have turned out differently had Pusey submitted affidavits (rather than rely on hearsay evidence) showing that Carter was not harassing male coworkers and that he had harassed other females.

To defend against such claims (and to promote healthy work environments), employers confronted with aggression in the work place are wise to take prompt and appropriate action against offenders. Denying Pusey overtime so she would not have contact with Carter may not have been the most advisable course of action to prevent further harassment.

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