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PATTERSON V. COUNTY OF FAIRFAX No. 99-1738,2000 U.S. App. LEXIS 11009 (4TH CIR. MAY 18,2000)

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FACTS

Sheila Patterson, an African American woman, was hired as a police officer by the County of Fairfax in November 1983.[1] Throughout her employment, from 1983 to 1992, Patterson experienced incidents of verbal and physical harassment.[2] She claimed that these incidents created a hostile work environment.

Soon after starting work, in December 1983, a co-worker told her that she was oppressed.[3] The next year, that same officer also told her, "You have two strikes against you, you are Black and you are a female."[4] Then in 1985, that officer asked Patterson to shine his boots.[5]

In 1984, one of Patterson's training officers sprayed mace so that it hit her face and at another time, sprayed mace on her roll-call chair.[6] Another officer called her a "dumb bitch"[7] and in early 1986, another co-worker made disparaging statements about women in the police department.[8]

Patterson also claimed that when she asked for back-up, fellow officers would often respond that they were too busy.[9] At various times between 1983 and 1989, an officer stated in an affidavit that other officers called Patterson "a dumb nigger."[10] Another officer also reported in an affidavit that another officer referred to Patterson as "Zulu."[11] In 1990, Patterson was referred to as "cruiser butt" or "cruiser ass."[12]

She further alleged that her supervisors made up charges against her.[13] For instance, in September 1986, Patterson received an oral reprimand for touching someone with her flashlight, even though she admitted only to "nudging" the citizen.[14] She also claimed that other officers encouraged

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1. Patterson v. County of Fairfax, No. 99-1738, 2000 U.S. App. LEXIS 11009, at *2 (4th Cir. May 18, 2000).
2. *Patterson*, 2000 U.S. App. LEXIS 11009, at *3-9.
3. The co-worker said to Patterson, "Sheila, the problem with you is, you are oppressed. Black people are oppressed." *Patterson*, 2000 U.S. App. LEXIS 11009, at *16-17.
4. *Id.* at *17.
5. *Id.* at *3.
6. *Id.* at *4.
7. *Id.*
8. The co-worker stated, "Women don't belong on this police department. This police department went to pot when women were hired on the department. All women do is bitch. They aren't nothing but a bunch of bitches." *Patterson*, 2000 U.S. App. LEXIS 11009, at *17-18.
9. *Id.* at *7.
10. *Id.* at *18.
11. *Id.*
12. *Id.* at *8.
13. *Id.* at *6.
14. *Id.* at *6-7.

citizens to file complaints against her.[15] Patterson also complained of double standards between her and male officers regarding report corrections,[16] that her car was vandalized throughout the 1980s, possibly by fellow officers,[17] and that a dead mouse was placed in her mailbox at the police station in 1992.[18]

In 1993, Patterson filed suit against her employer, the police department of Fairfax County, alleging several claims.[19] After seven years of litigation, the only claim that remained was Patterson's Title VII[20] claim of a hostile work environment based on sex and race.[21] The United States District Court for the Eastern District of Virginia granted summary judgment for the County of Fairfax, finding that Patterson "had not established that her environment was either severe or pervasive as to alter the terms of her conditions of her employment."[22]

HOLDING

In a 2-1 decision, the United States Court of Appeals for the Fourth Circuit affirmed the district court's grant of summary judgment for the defendant on plaintiff's Title VII hostile work environment claim.[23] The majority found that Patterson's allegations were insufficient to satisfy the third element that the harassment be so severe or pervasive as to create a hostile work environment.[24]

ANALYSIS

The United States Court of Appeals for the Fourth Circuit reviewed de novo the district court's grant of summary judgment.[25] As such, it reviewed the evidence in the light most favorable to the nonmoving party.[26]

In order "[t]o establish a Title VII hostile work environment claim based on race and gender, Patterson must establish four elements: (1) unwelcome

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15. *Id.* at *7.
16. *Id.*
17. *Id.* at *8.
18. *Id.* at *8-9.
19. *Id.* at *2.
20. Title VII of the Civil Rights Act of 1964 states:

> It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.S. § 2000e-2(a)(1)(2000).
21. *Patterson*, 2000 U.S. App. LEXIS 11009, at *2.
22. *Id.*
23. *Id.* at *15.
24. *Id.* at *13.
25. *Id.* at *9.
26. *Id.*

conduct, (2) based on Patterson's race and gender, (3) sufficiently pervasive or severe to alter the conditions of employment and to create a hostile work environment, and (4) some basis for imputing liability to the County."[27] On appeal, the sole question is whether Patterson's allegations were sufficient to establish that the harassment was severe or pervasive enough to create a hostile working environment.

The court began its analysis by examining the first element. It agreed that Patterson had met her burden of proving that the alleged conduct was unwelcome.[28] As for the second element, that the incidents were based on her race and gender, the court found only seven incidents to be applicable in this case: the "oppression," "two strikes," "dumb bitch," "dumb nigger," "Zulu," and "cruiser butt" comments, and the disparaging remarks about women in the police department.[29] The court found that "[t]he remaining incidents--ranging from routine disciplinary procedures to adolescent pranks to mean-spirited behavior--[were] simply not susceptible to an inference of racial- or gender-based hostility."[30]

With respect to the third element – whether the conduct was so severe or pervasive as to create a hostile work environment – the court pointed out that Title VII does not "provide a remedy for every instance of verbal or physical harassment in the workplace."[31] Instead, the court noted that Title VII "prohibits only harassing behavior that is so severe or pervasive as to render the workplace objectively hostile or abusive."[32] The court emphasized that the Supreme Court has made it clear that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."[33]

The court also noted that the seven incidents it deemed were sufficiently shown to be based on Patterson's race and gender occurred over a seven-year period.[34] To the extent that a few incidents spanned such a long period of time, that "suggest[ed] the absence of a condition sufficiently pervasive to establish Title VII liability."[35] The court also referred to two other United

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27. *Id.* at *9-10. *See* Smith v. First Union Nat'l Bank, 202 F.3d 234, 241 (4th Cir. 2000) (listing elements of hostile work environment claim).

28. *Patterson*, 2000 U.S. App. LEXIS 11009, at *10.

29. *Id.* at *10-11.

30. *Id.* at *11 (citing Yarnevic v. Brink's, Inc., 102 F.3d 753, 757-58 (4th Cir. 1996) (holding that remote inferences and conclusory allegations of motivation do not defeat summary judgment).

31. *Id.* at *12 (quoting Lissau v. Southern Food Serv., Inc., 159 F.3d 177, 183 (4th Cir. 1998)).

32. *Id.* (quoting Hartsell v. Duplex Prods., Inc., 123 F.3d 766, 773 (4th Cir. 1997)).

33. *Id.* (quoting Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (internal citations and quotation marks omitted)).

34. *Id.* at *13.

35. *Id.* (quoting Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 753 (4th Cir. 1996)).

States Court of Appeals cases, *Baskerville v. Culligan Int'l Co.*[36] and *Bolden v. PRC, Inc.*,[37] in support of its view that the alleged incidents "fall short of the consistent abhorrent conduct prohibited by the statute."[38] The majority cited *Baskerville* and *Bolden*, a Seventh Circuit case and Tenth Circuit case, respectively, because these cases considered the frequency of offensive comments to be an important factor in supporting a claim that the alleged harassment was so severe or pervasive as to create a hostile work environment.[39]

The court then pointed out that Title VII has a subjective component as well.[40] It quoted *Faragher v. City of Boca Raton*,[41] stating "that in order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."[42] In its analysis, the court thought it was important to note that Patterson herself used the terms "nigger" and "bitch" when referring to other people.[43]

The court concluded that "though the lack of professionalism shown at times by Patterson's co-workers certainly led to periods of unpleasantness, this is beyond the scope of Title VII."[44] The majority believed that although it is the courts' responsibility to follow Congress' intent to proscribe racial and sexual harassment in the workplace,[45] courts cannot allow "Title VII [to] become a general civility code."[46] In this case, the court was concerned that if it were to hold that Patterson's complaints were enough to establish a hostile work environment claim, Title VII would be "stretch[ed] . . . beyond permissible limits."[47]

The court did not address the fourth element of a Title VII hostile work environment claim, imputing liability to the employer, because it had already decided that Patterson did not establish a hostile work environment.

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36. Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995) ("The infrequency of the offensive comments is relevant to an assessment of their impact. A handful of comments spread over months is unlikely to have so great an emotional impact as a concentrated or incessant barrage.").

37. Bolden v. PRC Inc., 43 F.3d 545, 551 (10th Cir. 1994) ("Instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments.").

38. *Patterson*, 2000 U.S. App. LEXIS 11009, at *13.

39. *See supra* notes 36-37.

40. *Patterson*, 2000 U.S. App. LEXIS 11009, at *13-14.

41. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

42. *Faragher*, 524 U.S. at 787.

43. *Patterson*, 2000 U.S. App. LEXIS 11009, at *14.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at *15.

In his dissent, Judge Michael said that Patterson had established sufficient evidence to create a triable issue of fact.[48] He agreed that Patterson had met her burden on the first element, but noted that in looking at the remaining elements since the case was at the summary judgment stage, the court was required to view the facts in the light most favorable to Patterson.[49] Patterson therefore met all the elements of a Title VII hostile work environment claim.[50]

In addition to the seven incidents that the majority identified as related to Patterson's race and gender, the dissent would offer at least five more incidents to establish the second element: fellow officers' refusal to provide back-up,[51] the mace spraying,[52] the shoe shine remark,[53] the "nudging" and oral reprimand episode,[54] and the encouragement of citizens by fellow officers to file complaints against Patterson.[55] The dissent believed that a reasonable jury could have found that these "additional events would not have occurred 'but for' Patterson's race or gender."[56]

The dissent disagreed with the majority for "discount[ing] the incidents on grounds of infrequency."[57] In analyzing the third element, the dissent would follow the Supreme Court's instructions in *Harris v. Forklift Systems, Inc.*[58]. Although the majority did refer to the *Harris* Court's statement that the court must "look[] at all the circumstances" to determine whether an environment is hostile,[59] the dissent elaborated on the Supreme Court's statement that "[t]hese 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."[60] With these factors, the dissent analyzed the third element.

The dissent believed that Patterson presented evidence of situations that were not only racial or sexual in nature, but were also repeated and frequent harassment.[61] Judge Michael pointed out that the other five incidents should have been considered. Because "no white or male officers in the department were treated in the same way, it would be reasonable to infer that Patterson

48. *Patterson*, 2000 U.S. App. LEXIS 11009, at *15 (Michael, J., dissenting).
49. *Id.* at *16 (Michael, J., dissenting).
50. *Id.* (Michael, J. dissenting).
51. *Id.* at *19-20. (Michael, J., dissenting).
52. *Id.* at *20. (Michael, J., dissenting).
53. *Id.* (Michael, J., dissenting).
54. *Id.* at *20-21. (Michael, J., dissenting).
55. *Id.* at *21. (Michael, J., dissenting).
56. *Id.* at *19. (Michael, J., dissenting).
57. *Id.* at *23. (Michael, J., dissenting).
58. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).
59. *Patterson*, 2000 U.S. App. LEXIS 11009, at *14 (citing *Harris*, 510 U.S. at 23).
60. *Harris*, 510 U.S. at 23.
61. *Patterson*, 2000 U.S. App. LEXIS 11009, at *23-24 (Michael, J., dissenting).

would not have been the victim of these other incidents but for her race or gender."[62] The dissent believed that Patterson had met her burden of establishing the third element, as well as the fourth element, and thus had created a genuine issue of material fact that entitled her to a trial on her Title VII hostile work environment claim.[63]

CONCLUSION

It is well established that a hostile work environment is actionable under Title VII because it amounts to discrimination in the conditions of employment.[64] However, as the Fourth Circuit's decision in this case demonstrates, a court will examine each alleged incident closely. It will consider the incident itself, as well as the frequency of those incidents. The Fourth Circuit's reliance on cases that emphasized the frequency of offensive events will make it even harder for future plaintiffs to establish a Title VII hostile work environment case, much less to win one.

The majority's focus on the frequency of racial or sexual incidents, however, is misplaced. Instead of looking at each incident individually and piecemeal, courts should consider all of the incidents together, in accordance with the Supreme Court's directive in *Harris* that a court "look[] at all the circumstances" in order to determine whether an environment is hostile.[65] The dissent pointed out that the incidents alleged were "situations that involved both repeated and frequent harassment."[66] Other courts should examine alleged incidents in future cases as the dissent did in this case, keeping in mind that the frequency of conduct is only one factor in determining whether incidents are sufficiently severe or pervasive.[67]

The majority's emphasis on the frequency of racial or sexual incidents also downplays the effect of a single impermissible incident. A racial slur or sex-based conduct is inappropriate in itself, regardless of the frequency of its occurrence. Due to the court's heightened standard for establishing a Title VII hostile work environment claim, its decision allows room for racial and ethnic minorities to be harassed "infrequently" based on their race and gender.

One of the difficulties that confront plaintiffs is that "hostile work

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62. *Id.* at *19 (Michael, J., dissenting).

63. *Id.* at *28 (Michael, J., dissenting).

64. *Patterson*, 2000 U.S. App. LEXIS 11009, at *12. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63-68 (1986) (agreeing that kind of workplace conduct that may be actionable under Title VII include, "such conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment").

65. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (holding that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances").

66. *Patterson*, 2000 U.S. App. LEXIS 11009, at *23 (Michael, J., dissenting).

67. *Id.* (Michael, J., dissenting).

environment" is a term of art that is not defined. Another difficulty is that it is not clear what must be proved to establish that conduct was "pervasive" or "severe" enough to alter the conditions of employment. And how much must the conditions of employment be altered? Since there is not a set standard or a clear line, plaintiffs are at the mercy of a court's interpretation, which may vary from case to case.

Another difficulty that plaintiffs face is the requirement that the environment be not only subjectively offensive, but also that a reasonable person would find it objectively hostile.[68] Determining whether a reasonable person would find an environment hostile or not is difficult, especially considering that judges disagree among themselves. In fact, some scholars believe many courts are misusing summary judgment in hostile environment cases.[69] It is already difficult enough for a court to determine, just from documents alone, how an employee might regard his or her own work environment.[70] If judges cannot conclusively determine whether a reasonable person would find an environment objectively hostile, it seems appropriate that a jury should be allowed to hear the facts and make such a determination. If Sheila Patterson had been given the opportunity, it is possible that a jury could have reasonably found the harassment sufficiently severe or pervasive to create a hostile work environment.

However, in the article, "The Misuse of Summary Judgment in Hostile Environment Cases,"[71] Theresa Beiner found that there is currently a trend in courts "to avoid finding alleged acts of harassment sufficiently severe or pervasive to go to the jury."[72] Although the Seventh Circuit leads this trend,[73] the Fourth,[74] Sixth,[75] and Tenth Circuits[76] also engage in the kind of analysis

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68. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) (stating that "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so").

69. *See* Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 98 (1999) (stating that courts "often use incorrect standards, decide cases on disputed facts, ignore the standard applicable to hostile environment cases–the totality of the circumstances–altogether").

70. *Id.* at 102.

71. Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999).

72. *Id.* at 114.

73. *See, e.g.*, Galloway v. General Motors Service Parts Operations, 78 F.3d 1164, 1167-68 (7th Cir. 1996) (holding that term "sick bitch" was not gender-related term).

74. *See, e.g.*, Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996) (holding that alleged incidents, occurring over seven-year period, did not create sufficiently hostile environment to establish Title VII claim).

75. *See, e.g.*, Crawford v. Medina Gen. Hosp., 96 F.3d 830, 836 (6th Cir. 1996) (stating that "even apart from the fact that only two comments were actually discernibly age-based, there is simply no question that the hostility at Medina, while not insubstantial, was not particularly severe or degrading").

76. *See, e.g.*, Bolden v. PRC Inc., 43 F.3d 545, 551 (10th Cir. 1995) (stating that "[i]nstead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments").

that results in judges ruling on summary judgment motions, essentially taking the case from the jury.[77] This case from the Fourth Circuit follows this trend.

This trend towards granting summary judgment is troubling for future plaintiffs. Given that certain circuits are more prone than others to decide cases at the summary judgment stage, will the success of future plaintiffs depend on the circuit they are in? In this case, the majority applied a strict standard for evaluating future Title VII hostile work environment claims based on race and gender that will make it difficult for future plaintiffs to get past the summary judgment phase in the Fourth Circuit. However, other courts are well advised to look to the dissent when making their own analyses.

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77. Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. at 115.