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January 2011

Court holds that employers may be held liable under Title VII for allowing black employees to say “N-word,” but not white employees.

Pennsylvania Court Concludes that Firing for Use of N-Word May Be Unlawful as Reverse Discrimination

By Matthew Hank and Nina Markey

In *Burlington v. News Corp.*, No. 09-1908 (E.D. Pa. Dec. 23, 2010), the U.S. District Court for the Eastern District of Pennsylvania denied the employer’s motion for summary judgment, holding that an employer may be liable for racial discrimination if it punishes a white employee for using the “n-word” but allows black employees to use the same word. The *Burlington* court is the first federal court to consider this issue, and it provides important guidance regarding what role social norms may play in an employer’s decision to tolerate or reprimand racially sensitive speech. The court in *Burlington* also clarified the standard for when a subordinate’s bias may be imputed to the person who decides to terminate an employee, commonly referred to as “Cat’s Paw” liability.

Background

Thomas Burlington, a white male, was an award-winning anchorman on Fox 29 News in Philadelphia. During a newsroom editorial meeting in June 2007, in the course of discussing a story about the NAACP holding a symbolic burial for the “n-word,” Burlington expressed his view that, to give the story more credence, the station should “either say the word ‘n_____’ or refer to it as a racial epithet or racial slur instead of using the phrase the ‘N’ word.” Plaintiff also asked during the meeting “Does this mean we can finally say the word ‘n_____?’” Afterward, Burlington spoke with several of his coworkers who were apparently upset by his remarks, and used the “n-word” in several of the conversations.

Complaints about Burlington’s use of the “n-word” at the meeting prompted the station’s Human Resources Department (“HR”) to investigate. As part of that investigation, HR asked Burlington to give his version of events. Burlington recited what he had said during the meeting, using the “n-word” in the process. Burlington’s use of the word was not well received, and the meeting ended abruptly. The station suspended Burlington while it completed its investigation.

During the investigation, but before the termination, Burlington’s suspension generated adverse publicity, and some employees requested that they not be assigned to work

with Burlington, some citing concerns about their safety. Another African American coworker wrote an email to station supervisors regarding Burlington's use of the "n-word" during the news meeting.

About a week after the investigation concluded, and before the station decided to terminate Burlington, co-anchor Joyce Evans (an African American female), informed station management that various organizations of black journalists and individuals had complained to her about Burlington's use of the "n-word." Evans expressed concern to station management about their "chemistry" if Burlington returned on air. Burlington also testified that Evans told him that he could not say the "n-word" because he was white. Significantly, this was not Evans' first experience with a racial controversy: During an earlier lawsuit, Evans previously told the station's General Manager and two News Directors that the station "had a [news] team that was very white," and that people were concerned that a station billboard with four white anchors was located in predominately black and Hispanic neighborhoods.

After considering the complaints of Burlington's coworkers, the station's General Manager decided not to put Burlington back on air, and that his contract would not be renewed when it expired, citing the station's concern for Burlington's safety.

Burlington's Claim of Reverse Discrimination

Burlington brought a "reverse discrimination" claim under Title VII, alleging that the station terminated him because of his race. The court allowed Burlington to take that claim to trial. Even though the station had arguably put forth a legitimate reason for Burlington's termination, the court concluded that Burlington had evidence that this reason was a pretext for racial discrimination, for two reasons as detailed below.

Court Rejects "Societal Norm" Justification for Distinguishing Between Employees' Use of the "N-Word" Based upon the Race of the Speaker

First, on at least two occasions, station management knew that a black employee used the "n-word," but did nothing. Once, during a newsroom editorial meeting, an African American news anchor made a pejorative reference to an accused criminal as a "dumb n_ _ _ _ _." Another instance occurred when an African American employee wrote an e-mail complaining of Burlington's use of the "n-word" and included the word "n_ _ _ _ _" in the email three times. Regarding both instances, the court concluded that the station's decision to tolerate black employees' use of the "n-word," while forbidding Burlington from doing the same, permitted the inference that race influenced the decision to terminate him.

In reaching this conclusion, the court addressed "an issue that does not appear to have been decided by the federal courts: Can an employer be held liable under Title VII for enforcing or condoning the social norm that it is acceptable for African Americans to say n[_ _ _ _] but not whites?" Although the court was sympathetic to the argument that, when the "n-word" is viewed in its historical context, people might "react differently when a white person uses the word than if an African American uses it," that context was not a legitimate reason to enforce or condone "the social norm that it is acceptable for African Americans to say 'n_ _ _ _ _' but not whites." Thus, a jury could infer from the station's inconsistent treatment of black and white employees who used the "n-word" that Burlington was discharged because he was white.

Court Only Requires Plaintiff to Demonstrate that Coworkers Influenced Adverse Employment Decision to Support Cat's Paw Theory of Liability

In further addressing whether Burlington could show that the station's professed reason for his discharge was really a subterfuge for discrimination, the court examined an issue that has divided federal courts: What level of evidence is needed to impute a subordinate's bias to the employer, or to establish what is commonly referred to as a "Cat's Paw" theory of liability. The court ultimately decided to impose a "lighter burden" on plaintiffs, merely requiring evidence that an employee with a discriminatory motive influenced or participated in the decision to terminate. (Depending upon how the Supreme Court rules in *Staub v. Proctor Hospital*, this aspect of the opinion may be short-lived.)

In reaching this conclusion, the court particularly focused on Evans' role in the termination. Although Evans did not make the decision to terminate Burlington, the court concluded that there was evidence that she exhibited a racial animus and at least *influenced* the decision. In deciding that Evans may have had a racial animus, the court relied upon Evans' comments years earlier about the racial composition of the news team and Burlington's testimony that Evans had told him that it was acceptable for blacks, but not whites, to say the "n-word." In concluding that Evans may have influenced the decision to terminate, the court cited Evans' involvement in the investigation of Burlington's use of the "n-word."

Because the employer failed to obtain summary judgment, Burlington may present his claim of racial discrimination to a jury, which may or may not ultimately find that his termination was based on race.

Practical Implications for Employers

Employers should draw at least three lessons from *Burlington*.

1. Make certain that the use of racially sensitive speech by employees of different races is treated consistently. Courts following *Burlington* will not be sympathetic to the argument that social norms justify allowing some employees to use racial epithets directed toward members of their own group while employees of different races are punished for using the same terms.
2. Even where there is no evidence that a decisionmaker is biased, the bias of any subordinate who merely influenced the ultimate decision may be imputed to the decisionmaker. This is a broad standard, and militates toward ensuring that the decisionmaker is influenced by as few people as is reasonably possible.
3. Little evidence is needed for a jury to infer that a decisionmaker, or someone influencing that decisionmaker, was biased. The court in *Burlington* intimated that the mere fact that Evans had protested, years earlier, that the news team was too white implied an anti-white bias. Employers should thus be careful to ensure that their affirmative action or diversity plans are couched in language that cannot be interpreted as preferring one race over another.

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 Matthew Hank is a Shareholder, and Nina Markey is an Associate, in Littler Mendelson's Philadelphia office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Hank at mhank@littler.com, or Ms. Markey at nmarkey@littler.com.