

FEATURE

# What to Know About Evolving Hostile Workplace Liability

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A recent federal appeals court ruling could broaden the horizons of what kinds of mistreatment can lead to legal liability for a [hostile workplace](https://www.shrm.org/topics-tools/employment-law-compliance/understand-and-prevent-hostile-work-environments) - (<https://www.shrm.org/topics-tools/employment-law-compliance/understand-and-prevent-hostile-work-environments> ).

A split panel on the 11th U.S. Circuit Court of Appeals decided to reinstate the case of the only nonwhite employee at a Florida commercial trucking company

who claimed he was subjected to a hostile work environment, and was fired and faced [retaliation - \( https://www.shrm.org/topics-tools/employment-law-compliance/retaliation-claims-101-what-every-employer-needs-to-know \)](https://www.shrm.org/topics-tools/employment-law-compliance/retaliation-claims-101-what-every-employer-needs-to-know) over his race.

## **Racist Remarks About Customers Alleged**

In this decision, the court found that racist remarks white colleagues allegedly often made about nonwhite customers bolstered the plaintiff's discrimination claims about the racism he experienced because, as the only person from a historically underrepresented group, he was part of the "out-group" in the workplace.

**Toolkit: Managing Equal Employment Opportunity** - (

<https://www.shrm.org/topics-tools/tools/toolkits/managing-eeo-equal-employment-opportunity> )

In his complaint, the plaintiff alleged it was "a normal practice" for his bosses at I-10 Trucking to make demeaning comments about customers who were not white and to pass them off to him when possible. When Black customers paid with cash, his boss would joke that they must have gotten the money through criminal means.

The district court tossed out the plaintiff's claims of unfair [termination - \( https://www.shrm.org/topics-tools/tools/need-to-know-termination-employment \)](https://www.shrm.org/topics-tools/tools/need-to-know-termination-employment) and retaliation, but the 11th Circuit revived his allegations of a hostile work environment, sending them back to trial.

Judge William Pryor said the case demonstrates that "an employee's complaint of a racially hostile work environment can be supported by evidence of discrimination in his workplace against all racial minorities."

Although this is not a “categorical rule to be applied to all claims” of hostile work environment by minority employees, Ethan Krasnoo, an attorney with Reavis Page Jump in New York City, said that this case “will become a citation goldmine” in “situations where a claimant alleging a hostile work environment seeks to support their claim about mistreatment” through showing widespread mistreatment of others “in similar but distinct protected classes.”

In the past, Krasnoo explained, courts have held that evidence of mistreatment against people whose identities overlap with the plaintiff’s can help establish evidence of a hostile workplace. But here, the court “expanded the scope to look to mistreatment not necessarily of individuals with the same racial makeup — for example, a Black employee pointing to mistreatment of other Black individuals — but rather to mistreatment ... within the broader category of nonwhite individuals.”

Samantha Brooks, an attorney with Seyfarth in Washington, D.C., said that this holding reflects evolving “societal understanding” of how cumulative acts of bias, harassment, and discrimination, including “unconscious bias” or “microaggressions,” might add up to a hostile work environment.

“It opens the door for employees who are making claims to say, ‘It wasn’t just a complaint or instance of a comment about my race. It was a work environment where comments about the race of vendors or customers were tolerated,’ ” Brooks said.

For employers, this decision should be a reminder to revisit their policies and consider revising to make it clear that there will be zero tolerance for derogatory comments about any protected group, no matter whether the comments are aimed at an employee, client, business partner, or customer, said Shireen Meshkati, assistant general counsel and human resources consultant for Engage PEO in Los Angeles.

## **Managers' Key Role**

While no employer can “have eyes and ears everywhere,” Meshkati emphasized that managers play a critical role in crafting a workplace culture where workers feel respected and free to report unfair treatment. They should be trained to recognize and report bad behavior when they encounter it, and signal to employees that they should feel free to do the same, she added.

“Managers are going to be really key in preventing these types of actions,” Meshkati said.

Robert B. Hinckley Jr., an attorney with Buchalter in Denver, Los Angeles, and Orange County, Calif., said that how employers respond when situations like these crop up can limit risk of litigation.

“A lot of times, what ends up causing the lawsuit is not the action, the discrimination, the harassment,” Hinckley said. “It’s that the employer didn’t address it adequately and effectively after the fact.”

“If you think you’re going to sweep it under the rug, you’re increasing your exposure and losing credibility with your employees,” he added.

A strong response involves thoroughly investigating any allegations of mistreatment, showing empathy and support for victims and delivering clear consequences if necessary, Hinckley said.

Employees who come forward with claims like the ones in this case should be met with “an empathetic reaction that what they heard is unacceptable,” Meshkati said. After investigating their claims, the company should continue following up and offer support such as employee assistance programs, which “can go a long way.”

It’s important to create an environment where everyone feels welcome and

where workers feel empowered to report bad behavior, experts agree.

While any program that makes decisions based on race or identity is ill-advised, employers should be striving to ensure equal opportunity under Title VII of the 1964 Civil Rights Act, Brooks said. In that way, the ruling is consistent with employers who wish to “comply with Title VII, including under more contemporary notions of harassment.”

**Related Article: Title VII Refresher** - ( <https://www.shrm.org/topics-tools/employment-law-compliance/title-vii-refresher-light-of-possible-criminal-investigations> )

While this case revolved around allegations of pervasive use of racial slurs, “we’re not seeing that as much in the workplace” more broadly, Brooks said. “What we’re seeing more of is more subtle examples of harassment, and employers do need to account for that in how they’re drafting policies.”

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