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PERSPECTIVE

One workplace harassment strike could mean an employee is out

By John-Paul S. Deol

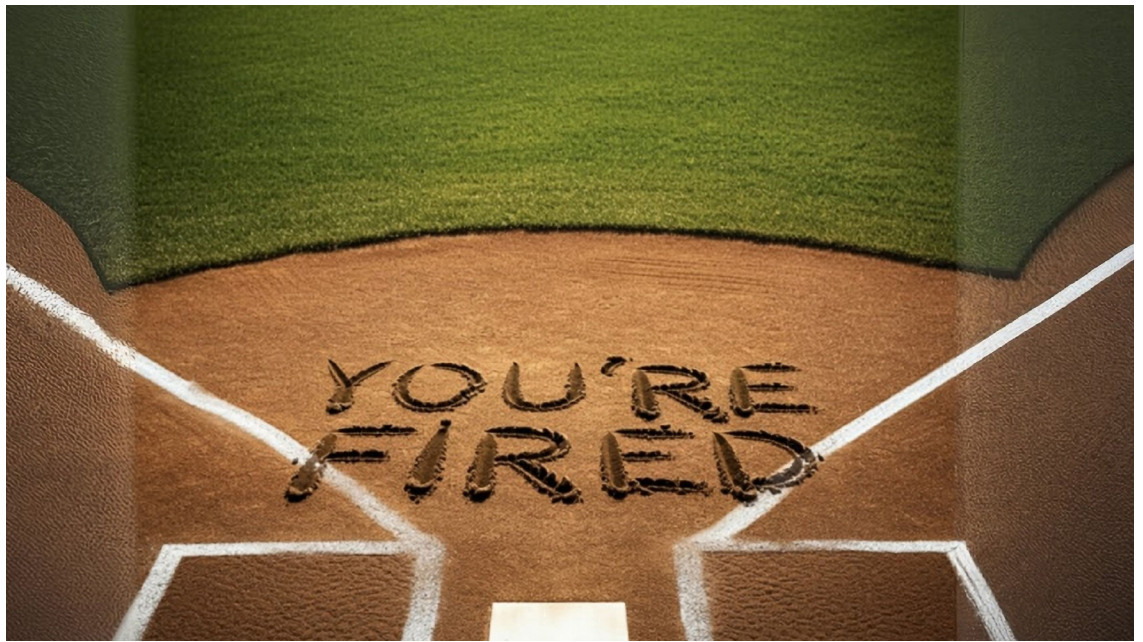
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The California Supreme Court's recent decision in *Bailey v. San Francisco District Attorney's Office*, No. S265223 brings significant clarity to the interpretation of workplace harassment and employer liability under the Fair Employment and Housing Act (FEHA). This article delves into the case background, the court's decision, its broader implications, and practical advice for employers.

The case began when Twanda Bailey, an investigator at the San Francisco District Attorney's Office, experienced a highly offensive racial slur from a co-worker. Bailey reported the incident, expecting corrective action. Although the offending employee was disciplined, Bailey claimed that this incident, coupled with other workplace conditions, created a hostile work environment. Bailey argued that this single incident was severe enough to constitute racial harassment under FEHA.

Bailey's initial claims were dismissed by the trial court, which ruled that a single incident, even if offensive, did not meet the threshold for creating a hostile work environment. The appellate court upheld this decision, prompting Bailey to seek review by the California Supreme Court.

The California Supreme Court reversed the lower courts' rulings,



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providing significant clarification on the standards for determining a hostile work environment under FEHA. The court highlighted that both severity and pervasiveness are critical in evaluating harassment claims. While isolated incidents generally do not meet the threshold, particularly severe incidents can suffice. This approach aligns with federal standards under Title VII of the Civil Rights Act of 1964. The court underscored that harassment must be both objectively and subjectively offensive. The behavior must be viewed as hostile or abusive by a reasonable person and also be perceived as such by the victim. Most importantly, the court noted that a single,

extremely severe incident, such as the use of a highly offensive racial epithet (the "n-word" in this case), could create a hostile work environment. This marked a departure from previous lower court decisions, which often required a pattern of behavior to establish a hostile environment.

The Bailey case is significant for several reasons:

1. Legal precedent: It sets a legal precedent by broadening the understanding of what constitutes a hostile work environment. The ruling clarifies that a single severe incident can suffice, which is a critical shift from the previous requirement for a pattern of behavior.

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2. Employee protections: The decision reinforces and extends protections for employees under FEHA, ensuring that even isolated but severe incidents of harassment are addressed legally.

3. Employer responsibilities: The ruling emphasizes the need for employers to take all complaints of harassment seriously, even if they involve a single incident. This has wide-ranging implications for workplace policies and practices.

Differences between FEHA and Title VII

The California FEHA provides broader protections compared to Title VII of the Civil Rights Act of 1964, particularly in the context of harassment claims. Here are key differences and relevant case examples:

1. Severity and pervasiveness : Under Title VII, courts often require a showing of both severity and pervasiveness to establish a hostile work environment. For instance, in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the U.S. Supreme Court held that isolated incidents, unless extremely serious,

do not amount to discriminatory changes in the terms and conditions of employment. In contrast, the Bailey ruling under FEHA accepts that a single, extremely severe incident can suffice.

2. Single incident threshold: Title VII generally requires a pattern of behavior, as seen in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), where the court emphasized a continuous course of conduct. However, in *Bailey v. San Francisco District Attorney's Office*, the California Supreme Court ruled that a single incident could meet the threshold if it is particularly egregious.

3. Objective and subjective standards: Both FEHA and Title VII require the harassment to be objectively and subjectively offensive. However, the application of these standards can differ. In *Harris v. Forklift Systems*, 510 U.S. 17 (1993), the U.S. Supreme Court held that the harassment must be both objectively severe and subjectively perceived as hostile, similar to FEHA, but with varying interpretations at the state level.

Practical advice for employers

In light of the Bailey decision, employers must take proactive steps to align their workplace practices with the clarified legal standards:

1. Update harassment policies: Employers should revise their harassment policies to reflect the court's emphasis on both severity and pervasiveness. Policies should clearly state that even a single severe incident can constitute harassment.

2. Training and awareness: Conduct regular training sessions for employees and management to recognize and appropriately respond to harassment. Emphasize the serious nature of racial slurs and other offensive conduct.

3. Prompt and adequate response: Employers must respond promptly and adequately to complaints of harassment. This includes conducting thorough investigations and taking appropriate disciplinary action when warranted.

4. Documentation and communication: Maintain detailed doc-

umentation of all reports of harassment and the steps taken in response. Clear communication with the complainant throughout the process is crucial to demonstrate the employer's commitment to a harassment-free workplace.

5. Support systems: Establish support systems for employees who report harassment. This can include counseling services and ensuring that the reporting process is accessible and free from retaliation.

The California Supreme Court's decision in *Bailey v. San Francisco District Attorney's Office* marks an important clarification of California employment law, expanding the scope of what constitutes a hostile work environment under FEHA. Employers must take proactive steps to align their policies and practices with this ruling to foster a safe and respectful workplace environment. By understanding and implementing these legal standards, employers can better protect their employees and mitigate the risks of harassment claims, ensuring compliance with the law and best HR practices.