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"How Much Do You Need?"

"All right, we have the bestiality, pedophilia; later we have two supervisors talking about his 'cat walk' and swishing of the hips, right? Well, I mean, how much do you need?" This was the question posed by Tenth Circuit Court of Appeals Chief Judge Jerome A. Holmes to an attorney for Walmart who was defending his client's summary judgment victory on a claim of sexual harassment.

A three-judge panel of the Tenth Circuit (which hears appeals of federal district court decisions from Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) was evaluating whether a New Mexico court had gotten it right in finding that a chain of "possibly homophobic and inappropriate" incidents towards and in front of a homosexual employee over four years was not severe or pervasive enough to constitute unlawful harassment under Title VII. *Sharpe-Miller v. Walmart, Inc.*, 710 F.Supp.3d 971 (D.N.M.). Those *alleged* incidents included:

- A manager told the employee, "if homosexuals got any more rights, we might as well legalize pedophilia and bestiality."
- Two supervisors made comments about the employee having a "cat walk."
- An associate called the employee "Jerry the fairy."
- Sexual orientation slurs were tolerated without confrontation or correction in the employee breakroom, both verbally and once where someone drew a person on the breakroom blackboard and labeled the drawing with "fa**ot" across its forehead. Supervisors heard and saw the breakroom slurs.

The judges were unimpressed with Walmart's argument that what appeared to be the most offensive incident (the drawing/slur) was not specifically directed to the plaintiff. The judges analogized the drawing/slur to a noose and the use of the "c-word" on a drawing of a woman. The judges also seemed to reject Walmart's argument that the "cat walk" comments were made in the midst of an overall joking conversation and were therefore not particularly severe. The judges repeatedly likened these comments to "objectively offensive" utterances like the n-word, which cannot be used or excused as a joking matter.

While these comments and questions from oral argument aren't a final decision, they still imply shortcomings in training and managing managers that could ensnare many employers.

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Employer Takeaways:

(1) The slur fa**ot may be judged to be as severe as nooses, the n-word, and the c-word. If you've been to our Effective Supervisor program, you'll know that those words and representations are the equivalent of a punch in the face: it doesn't take much, if anything more, to establish a hostile work environment.

(2) Employers act at their peril when they rely on context (like the race of someone using racial slurs, or whether or not two employees appeared to be joking when making sexually derogatory comments) to diminish the level of offensiveness of employee conduct and comments related to protected statuses.

(3) Break room, and, in some circumstances, even off-work-site behavior counts, and must be addressed by management.

If you have any questions or would like additional information, please contact Whitney Brown at 205-323-9274 or wbrown@lehrmiddlebrooks.com.

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