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### **Labor and Employment Alert: Bad Facts Make Bad Law: The Fourth Circuit Lowers the Bar for Hostile Work Environment and Retaliation Claims**

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The Fourth Circuit Court of Appeals (which covers Maryland, Virginia, West Virginia, North Carolina and South Carolina) recently held that calling an African-American employee a “porch monkey” twice within 24 hours was so severe that it created a hostile work environment. The Court also found that the employee’s complaints about the comments were protected by the anti-retaliation provisions of Title VII.

In *Boyer-Liberto v. Fontainebleau Corp.*, Reya Boyer-Liberto, an African-American waitress at the Clarion Resort Fontainebleau Hotel in Ocean City, Maryland, claimed that she was twice called a “porch monkey” and threatened with termination by a white restaurant manager. One day after complaining about this to the HR director, Boyer-Liberto was terminated, ostensibly for poor performance.

The trial court granted the hotel’s motion for summary judgment because the manager’s conduct “was not so severe or pervasive as to create a hostile work environment or to instill a reasonable belief in Liberto, such as would protect her from retaliation, that she had been unlawfully harassed.” Boyer-Liberto appealed to the Fourth Circuit, which affirmed the trial court’s decision. She then appealed to the full Fourth Circuit. On May 7, 2015, the Fourth Circuit reversed the decision (in a 12-3 ruling) and sent the case back because a jury could reasonably conclude that the work environment was hostile and that Boyer-Liberto had been retaliated against for complaining about it.

To show a racially hostile work environment, Boyer-Liberto had to prove that there was (1) unwelcome conduct; (2) that was based on her race; (3) which was sufficiently severe or pervasive to alter the plaintiff’s conditions of employment and to create an abusive work environment; and (4) which was imputable to her employer. The third element requires showing both that she and a reasonable person perceived the environment as hostile or abusive. The Court held that “a reasonable jury could find that [her manager’s] two uses of the ‘porch monkey’ epithet — whether viewed as a single incident or as a pair of discrete instances of harassment — were severe enough to engender a hostile

work environment.” The Court explained that “porch monkey” is “a racial epithet that is not just humiliating, but degrading and humiliating in the extreme.” Under the Court’s rationale, “an isolated incident of harassment, if extremely serious, can create a hostile work environment.” In reaching this conclusion, the Court overturned its own prior decisions, acknowledging that this decision “is a first for our court.”

Turning to the retaliation claim, Boyer-Liberto had to prove that she engaged in a protected activity; (2) that her employer took an adverse employment action against her; and (3) that there was a causal link between the two events. The Court held that “an employee is protected from retaliation when she reports an isolated incident of harassment that is physically threatening or humiliating, even if a hostile work environment is not engendered by that incident alone.” The Court explained its new holding protects an employee “who promptly speaks up to attack the racist cancer in his workplace,” instead of “remain[ing] silent.”

Ultimately, the Court remanded the case for trial, explaining that a jury could find that the two instances of name-calling were not severe enough to amount to a hostile environment. At the same time, however, the jury could find that Boyer-Liberto’s manager conduct was severe enough “to give a reasonable belief that a hostile environment, although not fully formed, was in progress.”

This case highlights the importance of taking complaints of harassment seriously, investigating them promptly and not retaliating against complaining employees. Even more than the underlying discrimination claim, allegations of retaliation continue to pose the greatest challenge to employers. According to the EEOC, 42% of all charges coming to the EEOC allege retaliation. Contact your Vorys lawyer if you have questions about an employee’s allegations, conducting a workplace investigation, or minimizing the risk of retaliation claims.