JORDAN V. ALTERNATIVE RES. CORP.: THE FOURTH CIRCUIT LIMITS PROTECTION FROM RETALIATION FOR EMPLOYEES REPORTING A HOSTILE WORK ENVIRONMENT

An employee makes a grossly racially discriminatory remark at work, and is discovered to have made many similar comments in the past. Is the fellow employee who reports the remark to his employer—pursuant to the employer’s anti-discrimination policy—protected from retaliatory discharge? If you said yes, you’re not a reasonable person, at least not in the Fourth Circuit.

Title VII of the Civil Rights Act prohibits employers from maintaining a work environment charged with racial harassment. While a hostile work environment can result from a single, severe discriminatory act, hostile work environments generally result only after an accumulation of discrete instances of harassment. Employees who oppose an unlawful employment practice are protected from employer retaliation by Title VII.

The Fourth Circuit held in Jordan v. Alternative Res. Corp. that an employee who complained about a serious racial slur, which he feared would ripen into a hostile work environment, was not protected against retaliation under Title VII. The court held that an employee must wait until an objectively reasonable person would believe that a hostile working environment has already taken shape before he can safely protest to his employer.

1. See Deborah Sontag, The Power of the Fourth, N.Y. TIMES, Mar. 9, 2003, Magazine at 38, 40 ("[T]he Fourth Circuit is considered the shrewdest, most aggressively conservative federal appeals court in the nation").
4. Harris, 510 U.S. at 21 (internal citations omitted)(noting that a discriminatory insult that is severe enough to “to alter the conditions of the victim’s employment and create an abusive working environment” violates Title VII); Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)(acknowledging that “extremely serious” isolated events can generate a hostile work environment).
5. Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002) ("Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct.... Such claims are based on the cumulative effect of individual acts").
Given the imprecise and usually cumulative nature of the conduct that transforms a workplace into a hostile work environment, the Fourth Circuit’s decision creates a corresponding uncertainty about when an employee opposing a hostile work environment is protected from retaliation by her employer. Furthermore, by stripping employees of protection from retaliation when they report initial indications of an abusive work environment, the case directly conflicts with well-established precedent requiring employees to report discrimination early. In both of these ways, Jordan severely complicates providing legal advice to employees. More alarming, however, is the decision’s potential to chill employee reporting and embolden retaliatory conduct by employers, contrary to the intent of Title VII.

Factual Background

Robert Jordan, an African American network technician at IBM, and Jay Farjah, a white coworker, "were standing near one another" in a network room to watch breaking news coverage of the arrest of two African American men who had allegedly carried out sniper shootings in the Washington, D.C. area. Farjah said, "[t]hey should put those two black monkeys in a cage with a bunch of black apes and let the apes fuck them."

When Jordan related the incident to several coworkers, two of them told him that "they had heard Farjah make similar offensive comments..."
many times before." Pursuant to his employers' policy that required reporting of "any conduct that the employees perceive to be discriminatory," Jordan reported the comment to two supervisors. One supervisor "expressed skepticism about Jordan's complaint and asked whether Jordan had considered the impact considered the impact that it could have on Farjah ... [and] suggested, without any evidence, that Farjah may have been joking." After a brief investigation in which Farjah made only a partial admission, Jordan complained to yet another manager, and expressed his intention to elevate the grievance to the site manager.

Following the report, the circumstances of Jordan's employment changed dramatically. Jordan's schedule was modified so that he could no longer arrive at work early—an arrangement he negotiated so he could pick up his child from school in the afternoon. He was given extra work assignments. One of his supervisors insulted him at a Thanksgiving party. Finally, after four years of employment, Jordan was fired within one month of making the report, "purportedly because he was 'disruptive,' his position 'had come to an end,' and management personnel 'don't like you and you don't like them.'"

Jordan filed a complaint against his employer in the U.S. District Court for Maryland. He alleged, inter alia, that because he was fired for reporting his coworker's racist comment, he had been subjected to unlawful

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15. Jordan I, 458 F.3d at 337, 353 (King J., dissenting). Jordan did not report his coworkers' corroborating statements until his Amended Complaint, which he filed after defendants submitted a motion to dismiss. The district court considered both the Complaint and the Amended Complaint in reaching its decision. Jordan I, 458 F.3d at 337.

16. First Amended Complaint for Relief from Unlawful Discharge, Jordan I, 458 F.3d at 332, page 3 of 9 (emphasis added); Jordan I, 458 F.3d at 350 (King J., dissenting). The majority opinion fails to mention the company's policy.

17. Jordan I, 458 F.3d. at 337.

18. First Amended Complaint for Relief from Unlawful Discharge, Jordan I, 458 F.3d at 332, page 4 of 9 (emphasis added); Jordan I, 458 F.3d at 350 (King J., dissenting). The majority opinion does not mention the supervisor's comments.

19. Jordan II, 467 F.3d at 379 (noting that supervisors "briefly investigated" Farjah's remark).

20. Farjah admitted to saying, "They should put those two monkeys in a cage." Jordan I, 458 F.3d at 337, 351.


22. Id. at 350 (King J., dissenting).

23. Id. at 337.

24. Id.

25. Id. at 349 (King J., dissenting)(noting that Jordan was "an employee of IBM and ARC since December 1998").

26. Id. at 336.

27. Jordan claimed that IBM and Alternative Resources Corporation were their joint employers. Id. at 336.

retaliation under Title VII and 42 U.S.C. § 1981. The court granted his employers’ motion to dismiss for failure to state a claim.

The Panel Majority’s Opinion

On appeal, a Fourth Circuit panel majority affirmed the district court’s dismissal. Judge Neimeyer’s opinion for the court focused on Jordan’s Title VII retaliation claim. Title VII prohibits retaliation against employees who oppose a discriminatory employment practice, which includes a hostile work environment. The central issue on appeal was whether, assuming the veracity of Jordan’s allegations, his report was “protected activity” under Title VII.

Whereas a narrow reading of Title VII’s anti-retaliation provision would indicate that only complaints about an actual discriminatory practice are protected, the Fourth Circuit—like the Ninth Circuit—has interpreted the provision as meaning that “opposition activity is protected [even] when it responds to an employment practice that the employee reasonably believes is unlawful.” In other words, it protects employees who act in good faith to oppose a statutory violation.

The Fourth Circuit majority quickly dismissed the contention that Jordan’s workplace constituted an actual hostile work environment within the ambit of Title VII, and went on to analyze the more complex question of whether Jordan could have reasonably believed the action he reported

29. Jordan made allegations of retaliation, wrongful discharge, breach of contract and fraud under a similar state law, as well as allegations of race discrimination under 42 U.S.C. § 1981 (prohibiting race discrimination in the making or enforcement of contracts). Jordan also argued in the alternative that if the court found that IBM was not Jordan’s employer, that he had experienced retaliation under the state statute and tortious interference with his employment contract. Jordan v. Alternative Resources Corp., 2005 WL 736610, at *2.


31. The first affirming decision, Jordan v. Alternative Resources Corp., 447 F.3d 324 (4th Cir. 2006), was vacated; the result was unchanged on rehearing. See Jordan I, 458 F.3d at 349 (King J., dissenting).

32. Jordan also claimed retaliation under 42 U.S.C. § 1981 and Montgomery County Code § 27-19(c)(1); the majority noted that “the applicable principles [for those statutes] are the same as those for determining liability under Title VII.” Jordan I, 458 F.3d at 344.


35. In reviewing dismissal under Fed. R. Civ. Pro. 12(b)(6), the court was “obliged to accept the facts alleged by Jordan as true, and review those allegations in the light most favorable to him.” Jordan I, 458 F.3d at 349.

36. Jordan I, 458 F. 3d at 351 (King, dissenting).

37. See, e.g., Trent v. Valley Electric Assn. Inc., 41 F.3d 524, 526-27 (9th Cir. 1994); Darmanin v. San Francisco Fire Dep’t, 46 Fed. Appx. 394, 395 (9th Cir. 2002). Although the Supreme Court has not directly ruled on this point, it has assumed this standard for the purposes of analysis. See Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001).

38. Jordan I, 458 F.3d at 338.

39. Id. at 339-40.
violated the statute. Jordan argued that that had Farjah been allowed to continue, his conduct would have “ripened into [a] racially hostile work environment,”\(^\text{40}\) and that Jordan’s complaint against this “incipient violation”\(^\text{41}\) should thus be protected from retaliation.

The court held that no objectively reasonable person could have believed that such comments were “likely to recur at a level sufficient to create a hostile work environment.”\(^\text{42}\) Further, Jordan would have been protected only if he believed that a Title VII “violation is actually occurring.”\(^\text{43}\) The majority affirmed the lower court’s holding that Jordan had failed to state a claim of retaliation under Title VII.\(^\text{44}\) Thus, the majority’s mythical reasonable person must have understood the nuanced difference between repeated but isolated slurs, and “severe or pervasive” conduct that creates a hostile work environment.\(^\text{45}\)

**Judge King’s Dissent**

First, Judge King pointed out that it was reasonable for Jordan to believe that the virulent\(^\text{46}\) slur was far from an isolated incident; it was rather “substantial (and ample) support for his reasonable conclusion that African-American workers at IBM’s facility were regularly exposed to conduct akin to the ‘black monkeys’ comment, and that such conduct would continue unless Farjah was confronted.”\(^\text{47}\)

Furthermore, King argued, the majority’s requirement that a violation of Title VII be actually occurring or planned before conduct is protected from retaliation conflicts with Supreme Court precedent. The Court’s decisions recognize the unique, additive character of hostile work environment claims, and that Title VII “does not separate individual acts that are part of the hostile environment claim from the whole.”\(^\text{48}\)

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\(^{40}\) *Id.* at 340.

\(^{41}\) *Id.* at 338.

\(^{42}\) *Id.* at 341.

\(^{43}\) *Id.* at 341.


\(^{45}\) “The mere fact that one’s coworker has revealed himself to be racist is not enough to support an objectively reasonable conclusion that the workplace has likewise become racist.” *Jordan I*, 458 F.3d at 341 (emphasis included). The majority dismissed Jordan’s coworkers’ “vague reverences” to Farjah’s past outbursts because Jordan “did not know about where or when such statements were made, or what Farjah said” and that there was “no allegation that any of those earlier statements interfered with Jordan’s or any other employee’s work performance.” *Id.*

\(^{46}\) Judge King’s extensive discussion of the severity of the remark is instructive. *Id.* at 350-351.

\(^{47}\) *Id.* at 353.

\(^{48}\) *Id.* at 354 (King dissenting)(quoting Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 118 (2002)).
Ellerth/Faragher affirmative defense requires employees to mitigate their damages under Title VII by reporting discrimination to their employers early. If an employee fails to report perceived discriminatory conduct, her employer may avoid liability for maintaining a hostile work environment. The majority opinion places employees in “an untenable position, requiring them to report racially hostile conduct, but leaving them entirely at the employer’s mercy when they do so.”

Judge King pointed out that the Supreme Court recently emphasized that “Title VII depends for its enforcement upon the cooperation of employees,” and interpreting Title VII’s anti-retaliation protection “to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of [Title VII’s] primary objective—preventing harm—‘depends.’”

En Banc Rehearing Denied

Jordan’s petition for rehearing en banc was rejected by a five-five decision. Judges Niemeyer and King penned antagonistic majority and dissenting opinions. The majority, instead of focusing on the reasonableness of Jordan’s belief, seized upon Jordan’s apparent admission that since his working environment had not already become a racially hostile one, his employer had not yet violated the statute. Thus, Niemeyer argued that, since employees are only protected from retaliation if they have already suffered a Title VII violation, Jordan failed to state a claim.

50. Ellerth 524 U.S. at 764-5; Faragher 524 U.S. at 807.
51. Jordan I, 458 F.3d at 352 (King J., dissenting). See also Jordan II, 467 F.3d 378 at 382 (King J., dissenting).
53. In the majority were Niemeyer (appointed by G.H.W. Bush), Widener (Nixon), Wilkinson (Reagan), Shedd (G.W. Bush), Duncan (G.W. Bush). In the dissent were King (appointed by Clinton), Wilkins (Reagan), Michael (Clinton), Traxler (Clinton), Gregory (Clinton, then G.W. Bush). See Federal Judicial Center > Judges of the United States Courts, http://www.fjc.gov/history/home.nsf.
54. Niemeyer’s opinion began, “The differences that Judge King has with the majority’s view of this case have puffed up the writings of all to such a level that they are addressing abstract arguments about the policy ramifications of Title VII’s retaliation provisions.” Jordan II, 467 F.3d at 379. In his dissent, King “memorialize[d] [his] profound disappointment with our Court's decision.” Jordan II, 467 F.3d at 381 (King J., dissenting).
55. “Jordan admitted that the single isolated racist comment that he heard did not amount to a practice that was made an unlawful employment practice under Title VII, but he did allege that Title VII might eventually be violated.” Jordan II, 467 F.3d at 379 (emphasis included). However, in asserting this point, the majority elides the fact that Jordan complained only after coworkers verified that “Farjah made similar offensive remarks many times before.” Jordan II, 467 F.3d at 379; see also Jordan II, 467 F.3d at 383 n.3 (Black J., dissenting).
56. Jordan II, 467 F.3d at 380-81.
King’s dissent reemphasized that the majority’s holding put employees in the untenable position of choosing “between hostile work environment claims and the protection authorized under Title VII’s anti-retaliation provision”—two protections that Congress had intended to “operate concurrently.” The five judges joining in the dissent took the unusual step of urging the Supreme Court to review the case, but the Court denied certiorari.

Consequences of Jordan v. ARC

This case highlights the consequences of the legal ambiguity regarding the inception of a hostile work environment. The majority’s decision implies that the discrete events that contribute to a hostile work environment may be considered for legal analysis as separate instances. That is, early instances of discrimination that may ultimately contribute to a hostile work environment may be severed from later such instances, and accorded no anti-retaliation protection. This position conflicts with the Supreme Court’s decision in Nat’l R.R. Passenger Corp. v. Morgan, which held that “[t]he statute does not separate individual acts that are part of the hostile environment claim from the whole for the purposes of timely filing and liability.” Even the first act that contributes to a hostile work environment violates Title VII. Accordingly, employees who oppose these early acts should be protected from retaliation.

The majority has created an impossibly high standard for the reasonable person, which assumes that the average employee understands nuanced, technical aspects of employment discrimination law. Empirical research has shown this to be incorrect. Other circuits have similarly attributed the average employee an improbably high standard of doctrinal legal knowledge in hostile work environment cases. The Ninth Circuit, for instance, has found that a reasonable employee would know that name-calling and a search of her personal belongings would not be considered an “extremely serious” practice in violation of Title VII.

57. Jordan II, 467 F.3d at 382.
58. Id. at 381, 383 (King J., dissenting).
61. See id. at 117 n.11 (implying that plaintiff can recover damages for conduct whose “discriminatory nature...is recognized as discriminatory only in light of later events).
62. Id. at 115. The Supreme Court recently reinforced this holding in Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162, 2175 (2007).
64. Darmanin v. San Francisco Fire Dep’t, 46 Fed. Appx. 394, 395 (9th Cir. 2002). The Ninth Circuit, like the Fourth Circuit, requires plaintiffs claiming retaliation to show a “reasonable belief” that a Title VII violation is occurring. See Breeden v. Clark County School Dist., 2000 WL 991821, at *1
Holding a layperson to such an advanced level of legal knowledge is particularly unwarranted considering the doctrinal uncertainty in the definition of a hostile work environment. The *Jordan* majority admits that a hostile work environment is created through either persistent or severe conduct. This test acknowledges by default that isolated incidents, if "extremely serious," could "amount to discriminatory changes in the terms and conditions of employment;" although "not every offensive comment will by itself transform a workplace into an abusive one," some actually do. This creates ambiguity in the law—as well as in an individual’s "objectively reasonable" understanding of the law—concerning what sort of isolated event would be severe enough to create a hostile work environment.

This decision will exacerbate the all-too-common reluctance of victims to report employment discrimination. It coerces knowledgeable employees who want to avoid retaliation to wait until their workplace becomes "permeated by racism, by threats of violence, by improper interference with work, or by conduct resulting in psychological harm." This is precisely the kind of work environment that Title VII fundamentally seeks to eliminate.

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(2000) (holding that Title VII prohibits retaliation against an employee who shows a "reasonable, good faith belief that the incident involving the sexually explicit remark constituted unlawful sexual harassment"); Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001) (assuming this standard for the purpose of analysis). Thus, it is possible that a decision like *Jordan* could emerge from the Ninth Circuit.

65. *Jordan I*, 458 F.3d at 341; *Jordan II*, 467 F.3d at 380.

66. *Jordan I*, 458 F.3d at 339 (internal citations omitted).

67. *Id.* at 342 (emphasis added).


69. *Jordan I*, 458 F.3d at 340 (defining a hostile work environment as more severe than the environment in which Jordan worked).