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Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z383W7T

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RECENT CASES

JONES V. UPS GROUND FREIGHT

I. Introduction

In Jones v. UPS Ground Freight, the court overturned a lower court’s ruling that an African-American employee was not reasonable in perceiving confederate flags, bananas being left on his truck, and late-night confrontation by fellow employees as racial harassment, making his working environment hostile or abusive. In recognizing that a hostile or abusive work environment can be created without direct and overt invidious racial discrimination, the court correctly applied recent employment-law jurisprudence of which the lower court seemed ignorant or defiant.

Indeed, given the facts of the case and relevant precedent, the lower court’s grant of summary judgment seems indefensible. For a court to deny the racist subtext behind white employees’ wearing confederate flags, attempting to intimidate a black employee for reporting perceived racial harassment, and indirectly suggesting that a black employee is a monkey would be laughable were it not so harmful. Fortunately, the appellate court recognized that such harassment constitutes a hostile work environment.

II. Facts

UPS Ground Freight (UPS), the defendant, is a shipping company with offices in Fulton, Mississippi (the “Fulton Terminal”) and Leeds, Alabama (the “Trussville Terminal”). Mr. Jones, who is African-American, was a truck driver who stopped at the Fulton terminal approximately two days per week and parked his truck at the Trussville terminal. The first instance of

1. 683 F.3d 1283 (11th Cir. 2012).
2. Id. at 1299.
4. Jones, 683 F.3d at 1304.
5. Id. at 1287.
6. Id.
racial harassment that Jones endured occurred during his initial training when Kenneth Terrell, a Caucasian UPS driver and the leader of the training session told Jones, “I know how to train you Indians.” After Jones informed Terrell that Jones was not Indian, Terrell responded, “I don’t care what race you are, I trained your kind before.” Jones testified that Terrell’s remarks were the only race-based comments made to him throughout his one year at UPS.

Jones further testified that he called his supervisor, Sue Miles, during the training period and told her that Terrell was saying “racist things.” Miles, by contrast, testified that she did not learn of the racial nature of this incident until she was questioned at her deposition. The court’s opinion does not mention what Miles’s previous understanding of the “nature of this incident” was.

Sometime after the training, Jones began to find remnants of bananas on his delivery truck in the yard at the Tresville terminal. The bananas were always either on the truck’s flat-bed or steps. Jones did not report finding the bananas until the third time it occurred. Jones then spoke to Keith Carter, Carter, the manager of the Trussville terminal, and told him and Carter that he, Jones, believed the banana peels were racially discriminatory. Carter told Jones that he did not believe anyone at the terminal was racist and recommended that Jones park his trailer in a different part of the lot. Jones testified that during his meeting with Carter, he also told Carter that some UPS employees were wearing confederate shirts and hats to work and that Carter replied that “that happened awhile back,” and that he, Carter, “told [the employees] that they couldn’t wear that type of stuff around here.” Carter testified that he had no recollection of Jones’s mentioning employees wearing confederate flags. According to Carter, the extent of his investigation into Jones’s claims was asking another supervisor “if he had noticed anything, anybody over that area or anything like that.”

7. Id. at 1288.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id. at 1289.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id. at 1290.
Less than a week after Jones reported the banana peels to Carter, two workers in the Trussville terminal confronted Jones and asked him why he told Carter about the confederate flags.\textsuperscript{21} The incident occurred at night, and one of the workers was carrying a metal crowbar or something similar.\textsuperscript{22} Jones testified that he reported this incident to Miles and told her he was considering quitting.\textsuperscript{23} Miles testified that Jones never told her about the incident but that he was asked to participate in a conference call with Miles and Kevin Martin, the Human Resources Manager for the UPSF Truckload Division.\textsuperscript{24} The parties’ testimony on what occurred during this conversation varied. Jones claimed that they discussed the confrontation by the two workers; Miles claimed that the purpose of the call was to discuss the banana incidents.\textsuperscript{25} Jones found bananas on his truck one more time after the conference call.\textsuperscript{26} Jones then told Miles that he wished to quit.

### III. Legal Background

Under both Title VII and Section 1981, a hostile work environment occurs "when the workplace is permeated with [racially] discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment."\textsuperscript{27} To prevail on a hostile work environment claim, an employee must prove that "(1) he belongs to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his membership in the protected group; (4) it was severe or pervasive enough to alter the terms and conditions of employment and create a hostile or abusive working environment; and (5) the employer is responsible for that environment under a theory of either vicarious or direct liability."\textsuperscript{28}

In considering whether a work environment is hostile, the court should consider the "social context in which particular behavior occurs and is experienced."\textsuperscript{29} The displaying of a confederate flag\textsuperscript{30} and the likening of a black employee to a monkey\textsuperscript{31} have each been part of previous actionable racial hostile work environment claims, particularly where no benign

\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 1291.
\textsuperscript{26} Id.
\textsuperscript{28} Edwards v. Prime, Inc., 602 F.3d 1276, 1300 (11th Cir. 2010).
\textsuperscript{29} Oncale, 523 U.S. at 81.
\textsuperscript{31} Green v. Franklin Nat’l Bank of Minneapolis, 459 F.3d 903, 911 (8th Cir. 2006).
The argument that such behavior constitutes a hostile work environment is strengthened when the conduct continues despite the employee's objections. Courts consider factors such as "its frequency...; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

At the summary judgment stage, the relevant standard of review is whether a reasonable trier of fact could conclude that the employee's "workplace [was] permeated with discriminatory intimidation, ridicule, and insult that [was] sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment."

IV. Holding

In Jones v. UPS, the Eleventh Circuit reversed the district court, holding that the "increasing frequency and seriousness of the harassment experienced by Mr. Jones presents a jury question on the issue of whether he endured a hostile work environment." This required only a finding that a reasonable juror could find in favor of Jones.

The court also ruled on two evidentiary issues. First, the court affirmed the district court's ruling that an inadmissible email could not be considered by the judge at the summary judgment stage. Second, the court reversed the district court's ruling that, as a matter of law, the banana incidents were not racially motivated and therefore irrelevant.

V. Legal Reasoning

The court reviewed the allegedly discriminatory conduct in the context that it occurred. The court then reviewed each incident alleged by the plaintiff and outlined a spectrum of inferences that a reasonable trier of fact could make in that context — from benign actions on one end to racial harassment on the other. "In the present case, a reasonable juror might take the view that the evidence does not paint a picture of a
work environment permeated with discriminatory intimidation, ridicule, and insult. . . . [A] reasonable juror also would be justified in taking a contrary view of the evidence. A juror could conclude that the harassment, sporadic at first, escalated in frequency and in seriousness to the point that it created a hostile work environment. 41

VI. Analysis

UPS v. Jones does not appear to break any new ground in workplace discrimination law. It is disappointing that the matter made its way to the higher court at all. The trial judge’s failure to see the pervasiveness of racial hostility behind monkey imagery, confederate flags, armed confrontation, and a racist statement is shameful. Case law, the racial history of America — particularly in Alabama — and the standard of review at summary judgment should have made this an easy decision for the trial court. Fortunately, the Eleventh Circuit corrected the trial judge’s poor judgment. UPS v. Jones did not extend legal protection of laborers and is unlikely to make waves, but hopefully it will entrench extant protections.

At the summary judgment stage, the moving party (UPS) must show that no reasonable trier of fact could find in favor of the non-moving party (Jones), 42 and all reasonable inferences must be made in favor of the non-moving party (Jones). 43 The alleged incidents clearly supported the inference that Jones was being racially harassed. 44 Case law confirmed each alleged incident as forming part of a “constellation of surrounding circumstances” 45 that makes up an actionable claim: monkey imagery, 46 display of confederate flags in the work environment, 47 racist statements, 48 and physically threatening confrontation. 49

The trial judge’s ruling, if upheld, would make it extremely difficult for employees to protect themselves from racial harassment. Indeed, if actions this blatant were consistently found insufficient to make an actionable claim for a hostile work environment, plaintiffs would find

41. Id. at 1302-03.
42. See FED. R. CIV. P. 56 (outlining the requirements for a moving party to prevail on summary judgment).
43. Id.
44. Jones, 683 F.3d at 1303-1304.
45. Id. at 1302.
46. Green v. Franklin Nat’l Bank of Minneapolis, 459 F.3d 903, 911 (8th Cir. 2006).
48. See EEOC v. WC&M Enters., Inc., 496 F.3d 393, 401 (5th Cir. 2007).
49. See, e.g., Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1276 (11th Cir. 2002).
protection only from the most overt forms of racial harassment—presumably only racist conduct that has no fathomable benign meaning.

Fortunately, the appellate court understood the harm caused by racial harassment that might also have a benign explanation. While the opinion will likely not add to hostile work environment jurisprudence in any significant way, hopefully it will provide guidance to trial judges and employers so that future instances of racial harassment in the workplace can be avoided, or at least more quickly rectified.

VII.
Conclusion

In UPS v. Jones, the Eleventh Circuit rightfully reversed the district court's finding that "even if Mr. Jones subjectively perceived the bananas, the Confederate flag clothing and the incident with the yardmen as sufficiently severe or pervasive to change the terms and conditions of his employment, such a view was not objectively reasonable." This reversal finds significant support in the case law. While the court's opinion does not extend or increase employee protections from racial harassment, it should serve to further clarify current protections to which employees are entitled. Unfortunately, it is questionable that such further iteration will serve to protect litigants from judges who fail to understand the law they apply and choose to see harm caused by rather blatant racial hostility as a product of unreasonable racial sensitivity by employees of color.

Zak Franklin, J.D. 2014 (U.C. Berkeley)

50. Jones, 683 F.3d at 1291.