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The United States Supreme Court holds that use of the word "boy" may be, without more, a racial epithet in certain contexts.

CONTEXT COUNTS: The Word "Boy" May Be a Racial Epithet at Work

By: Margaret Hart Edwards

In a brief unanimous opinion, the United States Supreme Court ruled on February 21, 2006 in *Ash v. Tyson Foods, Inc.* that the word "boy" without any words modifying it, can be a racial epithet depending on the context, inflection, tone of voice, local custom, and historical usage.

The case arose when two African-American superintendents at a poultry plant operated by Tyson Foods sought promotions to shift manager, but two white males were selected instead. The Tyson plant manager who made the disputed promotion decisions had referred on some occasions to each of the two African-American superintendents as "boy." When the case went to trial before a jury in the United States District Court for the Northern District of Alabama, the jury found race discrimination and awarded compensatory and punitive damages. Ruling upon a post-trial motion by Tyson, the District Court ordered a new trial. On appeal, the United States Court of Appeals for the Eleventh Circuit found sufficient evidence to support a verdict in favor of one of the two plaintiffs, but not the other, and further held that the evidence did not support the amount of compensatory damages awarded by the jury or the award of punitive damages. As part of its ruling, the Eleventh Circuit held that the use of the word "boy" alone, without any modifier such as "black" or "white," is not evidence of discrimination. In doing so it relied on two cases from the Eighth Circuit, and another case from the Eleventh Circuit holding the mere use of the word "boy" was not evidence of pretext.

The Supreme Court disagreed, holding that while the word "boy" is not always evidence of racial animus, "it does not follow that the term, standing alone, is always benign." "The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage." The Court ruled that requiring modifiers or qualifications in all instances to make the word "boy" evidence of bias was error.

The Court also criticized the Eleventh Circuit on another aspect of its ruling. The Eleventh Circuit ruled, "[p]retext can be established through comparing qualifications only when 'the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.'" The Supreme Court declined to define the standard for the disparity in qualifications required to prove pretext, but held that the Eleventh Circuit's "jump off the page" standard was "unhelpful and imprecise." The Court mentioned with apparent approval three standards used in other cases: (1) where disparities in qualifications are of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen

the candidate selected over the plaintiff for the job in question; (2) where the plaintiff's qualifications are "clearly superior" to those of the selected job applicant, and (3) where a reasonable employer would have found the plaintiff to be significantly better qualified for the job.

The opinion in *Ash v. Tyson Foods, Inc.* is not a surprise, but a useful reminder to employers that insensitive remarks by decision makers may be powerful evidence of discrimination. Where the remarks are by a decision-maker, in a context that connects them to the decision itself, and the context of the remarks gives them a discriminatory meaning, they are unlikely to be disregarded as "stray remarks." Neither the Supreme Court's opinion nor that of the Eleventh Circuit provides a detailed context for the remarks.

The Ash case may be used in the future to narrow the "stray remarks" doctrine. That doctrine holds that stray remarks, even by a decision maker, unconnected to the decision, are not evidence of discrimination. Under the stray remarks doctrine, for example, a reference to older workers as "old boys" has been held insufficient to prove pretext in an age discrimination case. Similarly, the U.S. Supreme Court itself held in *Price Waterhouse v. Hopkins,* 490 U.S. 228, 251 (1988), "Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision." The stray remarks doctrine was relied on in several gender discrimination cases where the word "bitch" has been found not to be evidence of discriminatory intent.

The case is a reminder of the perils of the subtleties of language. By its dictionary meaning, the word "boy" in most contexts is not discriminatory, or even insulting. In the context of use by a white manager about an African-American subordinate, in the South, the word may become an epithet, and was evidently understood that way by the jury in Ash with little difficulty. Similar difficulties arise in sexual harassment cases with the ordinarily innocent words "baby" and "mama." Context is everything.

Margaret Hart Edwards is a shareholder in Littler Mendelson's San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com or Ms. Edwards at mhedwards@littler.com.
