

# Should Employers Adopt a One-Strike Rule for Racial Slurs?

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In California, even a single racial slur by a non-management employee may now give rise to employer liability under certain circumstances. In *Bailey v. San Francisco District Attorney's Office*, the California Supreme Court, earlier this year, held that “an isolated act of harassment may be actionable if it is sufficiently severe in light of the totality of the circumstances.” *Bailey* involved the use of the N-word, but this case raises questions about what other types of isolated acts may constitute actionable discrimination under California law.

## What happened in *Bailey v. San Francisco District Attorney's Office*?

The plaintiff, Twanda Bailey, sued her former employer for race-based harassment and retaliation. She alleged that a colleague with whom she shared an office called her the N-word. Plaintiff reported the incident to human resources but alleged that the human resources manager prevented her from filing a formal complaint and intimidated her. The trial court granted summary judgment for the employer, which was affirmed by the appellate court on the grounds that plaintiff had failed to sufficiently allege severe or pervasive conduct as required for a claim of harassment. The California Supreme Court reversed, finding that the plaintiff had sufficiently alleged severe or pervasive conduct.

In rendering its decision, the Supreme Court distinguished a racial slur from simple teasing, offhand comments, and isolated incidents, which prior caselaw held are insufficient to create an actionable claim of harassment. The Supreme Court stated that the “objective severity of the harassment should be judged from the perspective of a reasonable person in the plaintiff’s position.” This means that the conduct should be considered from the perspective of someone belonging to the same racial group as the plaintiff. The Supreme Court also noted that courts outside of California “have recognized that use of an unambiguous racial epithet such as the ‘N-word’ may suffice” to state a claim for hostile work environment or harassment, citing to opinions from the Fourth and Fifth Circuits.

In assessing the totality of the circumstances, the Supreme Court also rejected the distinction between a supervisor and co-workers using a racial slur. Notably, here, it was alleged that the human resources manager’s close friendship with the person who uttered the racial slur impacted the manager’s ability to effectively investigate and address the issue. The plaintiff also presented evidence that the incident impacted her work performance and resulted in her seeking mental health treatment. The Supreme Court held that these facts, under the totality of the circumstances test, were sufficient to allege severe or pervasive conduct for a harassment claim.

## What Should Employers Do In Light of Bailey?

The most important takeaway is how the employer handled the employee's use of the racial slur. Maintaining and enforcing anti-harassment policies is of paramount importance, particularly identifying a point person who will objectively apply the policy. Enforcing those policies will ultimately limit an employer's liability. That was lacking in *Bailey*, serving as a reminder to update anti-harassment policies if necessary and ensure adequate training for managers.

In referencing out-of-state federal cases, the Supreme Court in *Bailey* reminds employers that the utterance of one racial slur may import liability on employers not just in California but in other jurisdictions. This decision serves as a reminder of the importance of diversity and anti-bias training, which can prevent this type of inappropriate workplace conduct.

If you have any questions about discrimination and harassment claims or anti-harassment policies, please contact