

“NIGGER, PLEASE!”¹

Gregory S. Parks*

During the week of 2 September 2013, two federal courts—the Southern District of New York and the United States Court of Appeals for the Eleventh Circuit—handed down striking opinions.² In a nutshell, they both held that where a black employee/supervisor refers to black (or biracial) coworkers/supervisees with the use of the n-word, there can be employment discrimination under Title VII of the Civil Rights Act of 1964. While the courts’ respective opinions might have been lost on or surprising to the defendants, it should not have been for several reasons. First, courts have long considered the reality of intraracial employment discrimination.³ This has even been the case in the context of African Americans.⁴ Second, the historical legacy of the n-word should underscore the extent to which some African Americans may reasonably find the use of such language unwelcome.⁵ Third, social science suggests that the use of the n-word may reflect ill intent even when used between African Americans.⁶ Fourth, it is legally consistent—providing a clear rule for all in the employment context.⁷

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1. “[A] statement of disbelief articulated in an intragroup context.” Donald E. Lively, *Reformist Myopia and the Imperative of Progress: Lessons for the Post-Brown Era*, 46 VAND. L. REV. 865, 886 (1993); “It means [you’re] [k]idding me or that is outrag[e]ous between two [African Americans] having a discussion. It also means quit being rude in the black community. It can also mean stop the bullshit.” *Nigger Please*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=nigger+please> (last visited Nov. 10, 2013).

2. *Weatherly v. Ala. State Univ.*, 728 F.3d 1263, 1265–66 (11th Cir. 2013); Larry Neumeister, *New York Jury Punishes Use of Racial Slur by Black, Defendant Loses Lawsuit, Plaintiff Cites Degradation*, BOS. GLOBE (Sept. 4, 2013), <http://www.bostonglobe.com/news/nation/2013/09/03/case-puts-word-use-among-blacks-trial/CKTcxBY0aZqUADqBfv0oQJ/comments.html>.

3. See *infra* notes 25–28 and accompanying text.

4. See *infra* notes 25–28 and accompanying text.

5. See *infra* notes 29–34 and accompanying text.

6. See *infra* notes 35–37 and accompanying text.

7. See *infra* notes 38–39 and accompanying text.

In *Johnson v. Carmona and STRIVE, Inc.*, Brandi Johnson—an African American, female employee—recorded her African American, male employer—Rob Carmona—saying:

You and (a previous employee) are just alike. Both of you are smart as s[hit], but dumb as s[hit]. You know what it is . . . both of you are n[iggers], y'all act like n[iggers] all the time . . . And I'm not saying n[iggers] as derogatory; sometimes it's good to know when to act like a n[igger], but y'all act like n[iggas] all the time . . . both of you [are] very bright, but both [of] y'all act like n[iggers] at inappropriate times.⁸

Carmona argued that the term “nigga” could mean love or hate in black and Latino communities. To explain, Carmona said he may describe a friend by saying, “This is my nigger for thirty years.”⁹ Accordingly, he said he also used the word as a term of endearment towards Johnson. He was trying to communicate that she was “too emotional, wrapped up in her.”¹⁰ Drug counselors helped him overcome heroine addiction with “tough love and tough language.”¹¹ As such, he simply used the word to indicate “the negative aspects of human nature.”¹² STRIVE, Inc. argued that the word was a part of the tough love culture of the company, which was founded by Carmona to help people with troubled backgrounds find work.¹³ The jury found that use of the n-word in the workplace was discriminatory, regardless of the employer’s status as a minority or his personal understanding of the word.¹⁴

In *Weatherly v. Alabama State University*, three former university employees—Jacqueline Weatherly, Lydia Burkhalter, and Cynthia Williams—alleged they had been subjected to a hostile work environment and retaliation during their employment.¹⁵ Weatherly testified at trial that her supervisor, LaVonette Bartley, frequently used the n-word in the workplace.¹⁶ Bartley commonly made comments in Weatherly’s presence like, “I’m tired of nigger shit.”¹⁷ She referred to ASU’s bus service as the “nigger bus line.”¹⁸

8. Erinn Cawthon & Kristina Sgueglia, *Black Boss’s N-word Rant to Black Employee Costs Him, Nonprofit \$280,000*, CNN (Sept. 4, 2013, 9:17 AM), <http://www.cnn.com/2013/09/03/us/new-york-racial-slur-lawsuit/>.

9. Larry Neumeister, *Case Against Rob Carmona, STRIVE East Harlem Founder, Questions Use of N-Word Among Blacks*, HUFF POST BLACK VOICES (Sept. 3, 2013, 8:22 PM), http://www.huffingtonpost.com/2013/09/03/rob-carmona-strive-east-harlem-founder_n_3859573.html.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. 728 F.3d 1263, 1266 (11th Cir. 2013).

16. *Id.*

17. *Id.*

Upset with Weatherly's apparent inability to multitask, Bartley informed Weatherly that she was "sick and tired of this nigger shit."¹⁹ Burkhalter, who is biracial, testified that Bartley also said, "they [aren't anything] but some niggas"²⁰ and called Burkhalter's seven-year-old son a "nigger."²¹ Williams testified that Bartley commonly referred to her as a "nigger"²² with comments such as "talk to the nigger side of the hand because the white side does not want to hear it" and "we [have] to dress professional; we don't dress like niggers."²³ The jury held for the plaintiffs, and the Eleventh Circuit affirmed.²⁴

While these holdings may seem surprising to the defendants and to some who rationalize African American's right to use the n-word amongst and toward one another, it should be unremarkable. First, courts have long acknowledged the fact that there can be intraracial employment discrimination. Under the third-party associative discrimination doctrine, it is plausible that, for example, a white supervisor might discriminate against a white employee for being in a romantic relationship with a black person.²⁵ In *Ellis v. United Parcel Service, Inc.*, while not framed as a third-party associative discrimination case, the Seventh Circuit contemplated an intra-racial employment discrimination case between African Americans.²⁶ Gerald Ellis, an African American manager at UPS, sued the company because of negative comments from and termination at the hands of African American supervisors for having dated and then married a white, hourly employee.²⁷ He ultimately lost on summary judgment motion, which was affirmed, in large measure because he had violated UPS' non-fraternization policy.²⁸

Second, in *Harris v. Forklift*, the U.S. Supreme Court recognized the reasonable person standard as the basis for determining whether unwelcome conduct is sufficiently pervasive and severe to constitute employment discrimination.²⁹ While the n-word has found a welcome home in certain parts of black popular

18. *Id.*

19. *Id.*

20. *Id.* at 1267.

21. *Id.*

22. *Id.* at 1268.

23. *Id.*

24. *Id.* at 1266.

25. See Gregory S. Parks & Quinetta M. Roberson, *Michelle Obama: A Contemporary Analysis of Race and Gender Discrimination Through the Lens of Title VII*, 20 HASTINGS WOMEN'S L.J. 3, 35-37 (2009) (discussing cases illustrating the third-party associative discrimination doctrine).

26. 523 F.3d 823, 824-25 (7th Cir. 2008).

27. *Id.* at 824.

28. *Id.* at 826, 830.

29. 510 U.S. 17, 22 (1993).

culture,³⁰ it has a negative history and negative connotation.³¹ In Lee Daniels’s recent and popular film, *The Butler*—about Cecil Gaines, an African American butler who worked in the White House—when Gaines tells his older African American mentor, Maynard, that Gaines would make a good “house nigger,” Maynard slaps him.³² Maynard goes on to tell him that the word “nigger” is “a white man’s word, it’s filled with hate.”³³ Such a finding is echoed in the law.³⁴ Not surprisingly, some African Americans find the term patently offensive.

Third, implicit social cognition research indicates that individuals tend to automatically, i.e., subconsciously, associate racial categories with positive or negative concepts. Most people tend to have a prowhite subconscious bias. For instance, 71% of whites, 67% of Asians, and 60% of Hispanics automatically associate positive things with whites and negative things with blacks.³⁵ Surprisingly, 32% of African Americans do the same.³⁶ Even more, prowhite subconscious biases predict the use of slurs against racial minorities.³⁷ While this research did not focus on African Americans and their use of the n-word, it provides some indicia that racial hostility may undergird the use of the n-word by some African Americans.

Fourth, these cases, in an essential way, underscore the call for consistency in tolerance, or lack thereof, in the use of the n-word in the employment context laid down by the Eastern District of Pennsylvania in 2010. In *Burlington v. News Corp.*,³⁸ a Caucasian employee brought a reverse discrimination case against his employer, which had terminated him after he used the n-word in front of several colleagues at an editorial meeting. The defendant employer unsuccessfully moved for summary judgment. The judge began his analysis by noting that the n-word’s meaning varies in

30. Gregory S. Parks & Shayne E. Jones, “Nigger”: A Critical Race Realist Analysis of the N-word Within Hate Crimes Law, 98 J. CRIM. L. & CRIMINOLOGY 1305, 1321–33 (2008).

31. *Id.* at 1316.

32. Lee Daniels’ The Butler Quotes: Clunky but Earnest, MOVIEQUOTESANDMORE.COM, <http://www.moviequotesandmore.com/the-butler-quotes.html> (last visited Dec. 4, 2013).

33. *Id.*

34. See RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD 56–112 (2002) (discussing the use of the n-word in the courtroom in a chapter titled “Nigger in Court”).

35. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 958 (2006).

36. *Id.*

37. Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 363 (2007).

38. 759 F. Supp. 2d 580 (E.D. Pa. 2010).

“color and content according to the circumstances and the time in which it is used.”³⁹ In analyzing the historical and current usage of the n-word, the judge acknowledged that Caucasians have used the word as a tool of oppression while African Americans have used the n-word in an ironic or affectionate way. Ultimately, the judge determined that it was unjustifiable to allow the employer draw race-based distinctions between employees because such action would run counter to Title VII’s purpose.

The two recent federal court cases about the intraracial use of the n-word and what it means under Title VII were correctly decided. Federal courts have clearly articulated that employment discrimination can lie between parties of the same race. The word can reasonably be construed as offensive by African Americans, no matter who says it. Even more, implicit social cognition research underscores that such slurs may flow from a place of antiblack sentiment, possibly among African Americans themselves. Lastly, the rule that emerges from these cases underscores the demand for consistency in prohibiting the use of the n-word in the employment context established in other jurisdictions. It is incredulous that the defendants in these two cases thought that they had a strong case. They should have settled!

39. *Id.* at 596 (citing *Towne v. Eisner*, 245 U.S. 418, 425 (1918)).