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LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

By Don Hays

Month of September – 2018

LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

Month of September - 2018 - PART ONE

Robinson et al. v. Alfred Perales et al., 894 F.3d 818, July 2, 2018

Perales, Robinson's supervisor, used the "N" word when speaking with Robinson. Numerous bad events followed.

FACTS: Sgt. Perales asked Officer Robinson, an Officer he supervised, why he did not shave his facial hair in compliance with the Department's grooming policy. Robinson, who considered himself "bi-racial," had brought in a doctor's note seeking an exemption from the shaving requirement because of a skin condition and complained that he was being picked on because of his ethnicity, that he was African American.

Perales, who was Hispanic, explained that he was familiar with racial discrimination. He quoted fellow officers as saying, "'We don't back n- - -rs up, you know, we don't help n- - -rs,'" Thereafter, when Robinson indicated he had facial scarring as a result of shaving, Perales commented: "[O]h, yeah, I see it, it must be the n- - -r in you." Robinson complained about the incidents.

Internal Affairs completed its investigation and recommended a five-day suspension for Perales. Chief Richardson instead imposed a twenty-day suspension.

Perales reacted badly to the suspension. He and Eric Hersey, a fellow supervisor and an African-American, ordered Timothy Spangler, Robinson's watch commander, to "go against" Robinson and Stephen Pawlik, Robinson's patrol partner and "get some shit on them and write them up." They also ordered Spangler, who had authority as a sergeant and commander of the third watch, not to give them anything they wanted or asked for such as time off or special assignments. Spangler refused to do as he was instructed.

Perales then let it be known that Robinson had better "watch his ass." This resulted in a second complaint being filed and Perales was transferred to another division of the Department and away from Robinson. (Interestingly enough, he was transferred to the Internal Affairs Division.)

Thereafter, Robinson was passed over for promotion and Spangler received two unfounded notices of infraction which were subsequently withdrawn. Also, the Department, after consulting with Perales, demoted Spangler from watch commander to patrol sergeant. Robinson and Spangler sued Perales

and others. The District Court found in favor of the defendant Officers and dismissed the complaints. Robinson and Spangler appealed.

ISSUE: Should Robinson's and Spangler's complaints have been dismissed? **ANSWER:** No.

FINDINGS: Robinson challenged the district court's dismissal of his claim for discrimination based on a hostile environment. The Court of Appeals noted that to succeed on a claim for hostile environment, a plaintiff must demonstrate that:

(1) he was subject to unwelcome harassment; (2) the harassment was based on race (or another protected category); (3) the harassment was severe or pervasive to a degree that altered the conditions of employment and created a hostile or abusive work environment; and (4) there is a basis for employer liability.

The Court then ruled that in determining whether conduct is severe or pervasive enough to alter the conditions of employment, courts must consider the severity of the alleged conduct, its frequency, whether it is physically threatening or humiliating (or merely offensive), and whether it unreasonably interferes with the employee's work performance.

Here, without considering all the circumstances, the district court concluded that a few instances of the use of this particular epithet (the "N" word) were not significant enough to meet the standard for a hostile environment.

The Court of Appeals disagreed. The Court held that whether harassment was so severe or pervasive as to constitute a hostile work environment is generally a question of fact for the jury. If a reasonable jury could find that the conduct was severe or pervasive, then the claim must go to trial. In the opinion of the Court, Perales's multiple uses of the word n- - - r in combination with his heightened scrutiny of Robinson and his call to others to act against Robinson were sufficient to create a triable issue for a jury on whether the harassment was severe or pervasive enough to constitute a hostile work environment.

First, according to the Court, the district court misstated the applicable legal standard, declaring that the conduct at issue must be "severe **and** pervasive" rather than "severe **or** pervasive." The Court held that the requirement was disjunctive, not conjunctive; the standard may be met by a single extremely serious act of harassment or by a series of less severe acts.

Second, the Court noted that, because of its threatening use throughout American history, this particular epithet can have a highly disturbing impact on the listener. Indeed, Eric Hersey, an African-American supervisor and a defendant in this case, who was present the first time that Perales used this slur, testified that this was an “ugly word” that shocked him when he heard Perales use it. Hersey in fact confronted Perales about his use of this slur as soon as Robinson left the area, telling Perales that it was inappropriate for a supervisor to use this word at work.

Third, Perales was not simply a co-worker; he was a supervisor with direct authority over Robinson. The Court held that perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as ‘n- - -r’ by a supervisor in the presence of his subordinates. Indeed, Perales used this slur not just in the presence of a subordinate but directed the epithet at Robinson himself.

According to the Court of Appeals, the district court agreed that this language was humiliating but the court noted that the first time Perales used this language, he was quoting the language of other officers in “apparent disapproval.” The Court of Appeals noted that Perales's speech to Robinson employed apophasis, the rhetorical device of denying one's intention to speak of a subject that is at the same time mentioned or insinuated. In other words, Perales denied that he was racist or that he used words like “n- - -r” by using the highly objectionable term multiple times as part of his purported denial. Although Perales employed the language of denial when delivering the first few instances of this epithet, the appellate court ruled that the district court should not have construed that fact in Perales's favor. A reasonable jury could find that, especially considering Perales's later use of the term to directly disparage Robinson, Perales's use of apophasis was really meant to distance himself from liability while still deriving the desired effect of disturbing the listener.

Fourth, the district court failed to consider the totality of Perales's conduct, separating some of the conduct out into retaliation instead of including it as part of the harassment. A jury could consider all of Perales's conduct towards Robinson, including his unusually close surveillance of Robinson and his directives to others to “get shit” on Robinson to write him up, and deny him benefits that he wanted such as time off or special assignments. When considered along with Perales's repeated use of the word “n- - -r,” there was a triable issue of fact regarding whether Perales's conduct was severe or pervasive enough to meet the standard for hostile environment. That Robinson was able to continue performing his job well was not dispositive, as the Officers argued. Interference with work performance was only one factor among many in the calculus.

According to the Court, resilient employees who manage to perform well in trying circumstances may still prove a hostile environment claim. The Court concluded that since the parties did not dispute that there were genuine issues of material fact on the other factors for a hostile work environment claim, and Robinson's claim should have gone to the jury. In other words, a jury must decide if Perales's conduct created a hostile work environment.

The analysis of this case will be completed in the October Training Case.

QUIZ QUESTIONS FOR THE MONTH OF SEPTEMBER – 2018 - PART ONE

Robinson et al. v. Alfred Perales et al., 894 F.3d 818, July 2, 2018

1. It is possible to discriminate against a person by creating a hostile work environment?
 - a. Yes.
 - b. No.
2. Here Perales used the "N" word on two separate occasions when speaking with Robinson, an Officer he supervised. Did the District Court believe that the conduct of Perales was serious enough to create a hostile work environment?
 - a. Yes.
 - b. No.
3. In this case, Perales used the "N" word to explain why he, Perales, was not a racist. The Court of Appeals found that this conduct on the part of Perales was not improper.
 - a. True.
 - b. False.
4. Here Robinson continued to do his job well despite the conduct of Perales. The defendants argued that this proved that Robinson did not suffer from a hostile work environment. Did the Court of Appeals agree with this argument?
 - a. Yes.
 - b. No.

QUIZ ANSWERS AND DISCUSSION FOR THE MONTH OF SEPTEMBER – 2018 - PART ONE

Robinson et al. v. Alfred Perales et al., 894 F.3d 818, July 2, 2018

1. It is possible to discriminate against a person by creating a hostile work environment?

a. Yes. This Court ruled: “To succeed on a claim for hostile environment, a plaintiff must demonstrate that: (1) he was subject to unwelcome harassment; (2) the harassment was based on race (or another protected category); (3) the harassment was severe or pervasive to a degree that altered the conditions of employment and created a hostile or abusive work environment; and (4) there is a basis for employer liability. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66–72, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986)

2. Here Perales used the “N” word on two separate occasions when speaking with Robinson, an Officer he supervised. Did the District Court believe that the conduct of Perales was serious enough to create a hostile work environment?

b. No. The District court did not believe that Perales’s was serious enough to support this action. Therefore, it dismissed Robinson’s claim against Perales. The Court of Appeals rejected this finding.

3. In this case, Perales used the “N” word to explain why he, Perales, was not a racist. The Court of Appeals found that this conduct on the part of Perales was not improper.

b. False. The Court of Appeals ruled that Perales had employed a rhetorical device (apophasis) to deny his intention to speak of a subject that was at the same time mentioned or insinuated. According to the Court, “(a)lthough Perales employed the language of denial when delivering the first few instances of this epithet, the court should not have construed that fact in Perales's favor on summary judgment. A reasonable jury could find that, especially in light of Perales's later use of the term to directly disparage Robinson, Perales's use of apophasis was really meant to distance himself from liability while still deriving the desired effect of disturbing the listener.”

4. Here Robinson continued to do his job well despite the conduct of Perales. The defendants argued that this proved that Robinson did not suffer from a hostile work environment. Did the Court of Appeals agree with this argument?

b. No. The Court ruled: “Resilient employees who manage to perform well in trying circumstances may still prove a hostile environment claim.”

LAW ENFORCEMENT OFFICER TRAINING CASE OF THE MONTH

Month of September - 2018 - **ALTERNATE CASE**

Anthony E. Smith v. Daniel Bandi, 2018 WL 3349012, July 9, 2018

A car appeared to have been broken into. Smith was arrested as a result. Was excessive force used?

FACTS: Smith rented a new, high-end sports car and parked it where the street was only dimly lit in a rough part of town. At about 4:15 a.m., Smith's girlfriend went to the passenger side of the car and leaned in to put her baby in the backseat. At the same time, a patrolling Officer noticed the car parked in an area known for high crime. That type of car was not common in that neighborhood. The Officer then noticed a person leaning inside the passenger side of the car.

Based on what he saw and his experience and training, the Officer believed a crime was being committed. He shined his squad spotlight on the car and saw the Smith emerge from behind a large tree near the car. When the Officer exited his squad car to investigate, Smith walked toward the Officer and put his left hand into his pants pocket. The Officer ordered Smith to take his hand out of his pocket, and Smith complied, but then he put his hand back in his pocket. Smith explained that he kept putting his hand back in his pocket "because it was chilly and cold outside from the rain," Smith's reaction and his repeatedly putting his hand in his pocket led the Officer to believe that he was reaching for a weapon.

To prevent the situation from escalating and to gain control of Smith so he could speak to him, the Officer took hold of the Smith's left hand and right shoulder and moved him to the back of the car. As the Officer was speaking on his radio, Smith broke free and began to run away. The Officer pursued Smith, grabbed his shirt and ordered him to stop resisting. Smith resisted the Officer's attempts to gain control by turning in circles. Smith's shirt ripped, and he once again began to run away. Because Smith was actively resisting, the Officer Tased Smith for a five-second cycle. Smith fell to the ground, rolled around and tried to pull the Taser wires out. Fearing that Smith might still have a weapon and because he continued to resist, the Officer used another five-second cycle charge. Being unsure whether Smith had broken the Taser wires, or the probes had come off, the Officer used a third cycle charge, this one for six seconds. Smith continued to pull at the Taser wires, got up off the ground, and began, yet again, to run away.

Eventually, the Officer caught up to Smith and tackled him to the ground. Fearing that Smith was again trying to access a weapon, the Officer ordered Smith to stop resisting and to put his hands behind his back. He then used an open-palm strike to Smith's back to try and get control of his arms, so he could put him in handcuffs. [Smith claimed that the Officer struck him with a closed fist and punched his "upper right and middle neck area." He

stated that the Officer weighed about 100 pounds more than he did, and that the Officer was astraddle him while punching him with a closed fist.

Smith further explained that because the Officer punched him in his face and slammed his face into the ground, he lost one tooth and had another tooth badly chipped, and his jaw became swollen from the punching. He also asserted that his pinky finger may have permanent damage; he stated that he could not straighten it or grip anything.]

The Officer then was able to take his pepper spray out of its holster and spray Smith's face for about one second. Smith argued that, once he was on the ground, he was not resisting, so there was no reason for the Officer to use pepper spray on him. Although Smith continued to struggle, eventually the Officer was able to handcuff him.

Smith thereafter sued the Officer claiming that his Fourth Amendment rights were violated when the Officer allegedly stopped him for no legitimate reason and allegedly used excessive force while first seizing him and then again when arresting him. Both Smith and the Officer asked the Federal District Court to find in their favor.

ISSUE: Should the District Court find in the Officer's favor and dismiss this case? **ANSWER: Yes and No.**

FINDINGS: 1st of 5) Smith first argued that the Officer illegally stopped him. In response, the Court ruled that an officer may conduct a brief, investigatory stop if he has a reasonable suspicion that criminal activity is occurring. Further, an officer may dispel his reasonable suspicion that a person has engaged or is engaging in criminal activity by briefly detaining the person.

To satisfy this "reasonable suspicion" standard, an officer must point to an objective justification for making a stop. Courts look to the totality of the circumstances known to the officer at the time of the stop, including the experience of the officer and the behavior and characteristics of the suspect.

Finally, the Court noted that while being in a high-crime area alone was not enough to support a reasonable suspicion, a high-crime area coupled with suspicious and evasive actions may support an officer's decision to stop an individual.

In this case, the Court concluded that Smith had not raised a genuine issue of material fact regarding whether the Officer had reasonable suspicion to conduct an investigatory stop. Smith presented no

evidence to contradict the Officer's assertion that the area where the events occurred is known by the police to be a high-crime area, nor did he rebut the Officer's assertion that it was uncommon to see a high-end sports car in that neighborhood. Smith further conceded that his girlfriend was crouching down and leaning into the passenger side of the vehicle at four o'clock in the morning when spotted by the Officer. Although Smith argued that his girlfriend had an innocent reason for doing so (placing her baby in the car), he did not provide any evidence to indicate that the Officer had reason to know what the girlfriend was doing at the time he observed her.

Additionally, Smith conceded that, after the Officer got out of his squad car, he (Smith) approached the Officer and repeatedly put his hand back in his pocket despite the Officer's repeated instructions to take it out. Again, Smith argued that he had an innocent reason for repeatedly putting his hand back in his pocket (he was cold), but he again presented no evidence that the Officer was aware of those reasons.

Consequently, the court found that the undisputed material facts established that the Officer had a reasonable suspicion to believe a crime might be taking place. Given that finding, the Officer could legally conduct a brief, investigatory stop to dispel his suspicion.

Therefore, the Court dismissed Smith's unlawful seizure claim.

2nd of 5 Next, Smith argued the Officer used excessive force to detain him. In response, the Court concluded that the Officer used reasonable force when he grabbed Smith's "left hand and right shoulder bicep area" and moved him to the back of the car. The Court noted that it was the wee hours of the morning in a high-crime neighborhood, and the Officer had observed someone leaning into the passenger side of a car that seemed very out of place. After the Officer ordered Smith to take his hand out of his pocket, Smith continued to put his hand back into his pocket.

The Court then noted that the question for the purposes of the issue of the Officer's use of force against Smith was not why Smith was doing what he was doing (i.e., his hands were cold). It was whether, from the perspective of a reasonable officer on the scene, the Officer's actions were "objectively reasonable" considering the facts and circumstances confronting that officer. The facts and circumstances confronting the Officer in this case when he grabbed the plaintiff's hand and bicep and moved him toward the back of the car were as follows: around 4:00 in the morning in a high-crime neighborhood, under circumstances where it appeared that the Officer might have walked into

a car theft, Smith walked toward the Officer, with his hand in his pocket, and despite repeated requests to keep his hand out of his pocket, kept returning it there.

The Court concluded that even viewing these facts in the light most favorable to Smith, Smith had not raised a genuine issue of material fact as to whether the Officer used reasonable force when he sought to gain control of Smith by grabbing his hand and shoulder and moving him to the back of the car to talk to him.

Consequently, the Court dismissed Smith's claim that the Officer used excessive force in detaining him.

3rd of 5) Additionally, Smith argued that the Officer used excessive force in arresting him. The Court noted that both Smith and the Officer agreed that after the Officer grabbed hold of him, Smith broke free and began to run. In doing so, Smith not only bolstered the Officer's initial suspicion that Smith was committing a crime, but he committed a crime (Obstruction).

According to the Officer, he continued to believe—based on the bulge in Smith's pocket and his repeated return of his hand into his pocket—that he possibly had a weapon and could pose a threat to the Officer or others.

Accordingly, the Officer was entitled to use a reasonable amount of force to prevent Smith's escape and effect the arrest. The question was whether the amount of force the Officer chose to use was reasonable. The Officer used his Taser to stop Smith from running; once Smith was on the ground, the Officer used the Taser twice more. The Officer argued that he needed to use the Taser more than once to try to subdue Smith; Smith argued that the repeated Taser shocks knocked him to the ground and caused puncture wounds in his back. Despite this, Smith got up from the ground and continued running.

The District Court noted that the Seventh Circuit Court of Appeals has held that it was reasonable for an officer to use a Taser when a defendant ignored the officer's command to stop. Therefore, the court found, given that decision, that even viewing the facts in the light most favorable to Smith, the Officer's use of the Taser to stop the plaintiff from running away was reasonable.

4th of 5) However, Smith also argued that after the Officer tackled him, the Officer, who weighed about a hundred pounds more than Smith, pinned him down and started punching him in his back, neck and face with a closed fist and sprayed him twice in the face with pepper spray.

The Officer disagreed with Smith's characterization. He argued that Smith continued to resist and explained that he used an open palm strike to Smith's upper back as way of forcing him to show his hands. The Officer denied striking Smith with a closed fist and maintained that he sprayed Smith with pepper spray only once after he was unable to gain control of Smith's arm.

The District Court found that there was a dispute as to an issue of material fact regarding the amount of force the Officer used on Smith after he tackled him, and whether that force was reasonable given all the facts and circumstances. According to the Court, police officers cannot use significant force on suspects who are no longer resisting or who are only passively resisting.

Consequently, the Court held that if a jury were to believe Smith's version of the events—namely, that the Officer repeatedly punched him in the face and neck with a closed fist and pepper sprayed him twice after he had stopped resisting—it could reasonably find that the defendant's use of force against the plaintiff after he was on the ground was excessive.

5th of 5) Finally, the Officer argued that even if he used excessive force when arresting Smith, he should be immune from liability. However, the Court ruled that an official is only entitled to qualified immunity if a plaintiff fails to show that a violation of a constitutional right occurred or fails to show that the right was clearly established at the time of the alleged violation.

According to the Court, the Officer here was on notice that using force against an unresisting individual violated the Constitution. If a jury were to accept the Smith's version of events, it would mandate the conclusion that the Officer's actions, after he had stopped Smith, violated Smith's clearly established constitutional rights. Because Smith had raised a disputed question of fact as to whether the Officer used reasonable force against him after the Officer tackled him, the Court held that the Officer was not immune from liability.

For these reasons, the Court refused to dismiss Smith's final complaint. A jury must decide if the Officer used excessive force after he tackled Smith.

QUIZ QUESTIONS FOR THE MONTH OF SEPTEMBER – 2018 - ALTERNATE CASE

Anthony E. Smith v. Daniel Bandi, 2018 WL 3349012, July 9, 2018

1. Smith argued that in this case, he was illegally detained by the Officer because the Officer did not possess a reasonable suspicion that he was committing a criminal offense. The District Court agreed with Smith.
 - a. True.
 - b. False.

2. Smith then argued that the Officer used excessive force by grabbing Smith's "left hand and right shoulder bicep area" and moving him to the back of the car." Did the District Court agree with this argument?
 - a. Yes.
 - b. No.

3. In this case, Smith complained that the Officer used excessive force when he Tased him merely because he had broken free and was running away. The District court agreed with Smith
 - a. True.
 - b. False.

4. Finally, the Officer argued that he should be immune from liability for striking Smith and then spraying him with pepper spray after he tackled him. Did the District Court agree with the Officer's argument?
 - a. Yes.
 - b. No.

Anthony E. Smith v. Daniel Bandi, 2018 WL 3349012, July 9, 2018

1. Smith argued that in this case, he was illegally detained by the Officer because the Officer did not possess a reasonable suspicion that he was committing a criminal offense. The District Court agreed with Smith.

b. False. It disagreed with him and ruled that the information the Officer observed was sufficient to justify Smith's detention. The Court said: "(t)he undisputed material facts viewed in a light most favorable to the plaintiff establish that the defendant had a reasonable suspicion to believe a crime might be taking place."

2. Smith then argued that the Officer used excessive force by grabbing Smith's "left hand and right shoulder bicep area" and moving him to the back of the car." Did the District Court agree with this argument?

b. No. The Court ruled: "Even viewing these facts in the light most favorable to the plaintiff, the court concludes that the plaintiff has not raised a genuine issue of material fact as to whether the defendant used reasonable force when he sought to gain control of the plaintiff by grabbing his hand and shoulder and moving him to the back of the car in order to talk to him."

3. In this case, Smith complained that the Officer used excessive force when he Tased him merely because he had broken free and was running away. The District court agreed with Smith

b. False. The Court held: "The Seventh Circuit has held that it was reasonable for an officer to use a Taser when a defendant ignored the officer's command to stop. U.S. v. Norris, 640 F.3d 295, 303 (7th Cir. 2011). The court finds, given that decision, that even viewing the facts in the light most favorable to the plaintiff, the defendant's use of the Taser to stop the plaintiff from running was reasonable."

4. Finally, the Officer argued that he should be immune from liability for striking Smith and then spraying him with pepper spray after he tackled him. Did the District Court agree with the Officer's argument?

b. No. The Court ruled that "there is a dispute as to an issue of material fact regarding the amount of force the defendant used on the plaintiff after he tackled him, and whether that force was reasonable given all of the facts and circumstances. Police officers cannot use significant force on suspects who are no longer resisting or who are only passively resisting. Abbott v. Sangamon County, Ill., 705 F.3d 706, 732 (7th Cir. 2013). If a jury were to believe the plaintiff's version of the events—namely, that the defendant repeatedly punched him in the face and neck with a closed fist and pepper sprayed him twice after he had stopped resisting—it could reasonably find that the defendant's use of force against the plaintiff after he was on the ground was excessive. Cyrus v. Town of Mukwonago, 624 F.3d 856, 863 (7th Cir. 2010)"