LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
MONDAY, MARCH 13, 2017

PERSPECTIVE

Racism allowed on movie sets?

By Steven J. Kaplan

Has it come to this? *In Daniel v. Wayans*, 2017 DJDAR 1204 (Feb. 9, 2017), the Court of Appeal, over Justice Elwood Lui's partial dissent, held that a black supervisor's verbal assault against a black subordinate, including calling him a "nigga" and a "black fat ass," is not objectively offensive, and thus does not amount to unlawful racial workplace harassment. In contrast, the court suggested, the same language used by a white supervisor would likely be unlawful.

California courts have long been criticized for refusing to accept the clear meaning of words. *E.g., Trident Center v. Connecticut Gen'l Life Ins. Co.*, 847 F.2d 546 (9th Cir. 1988). They now invite new criticism by ruling that under the Fair Employment and Housing Act, our anti-discrimination law, the meaning of certain words changes depending on the skin color of the speaker.

This new decision is freighted with heavy "political-correctness" baggage. And instead of establishing guidelines for future use, the decision endorses a "whatever's popular at the moment" approach that will likely lead to confusion and unpredictability. Because of shortcomings in logic and disregard for well-established precedent, it may loosen the reins on what is considered unlawful harassment in general, making it harder in particular for victims of sex harassment to prove their cases.

Like many employment decisions coming out of the entertainment industry, this one arose from an anti-SLAPP motion. Plaintiff Pierre Daniel was hired to work a single day as an "extra," or background actor, on a motion picture called "A Haunted House 2." The movie starred, and was co-written and produced by, Marlon Wayans. Extras are low-wage earners, without speaking parts, found at the bottom of the movie-making hierarchy.

Daniel had no prior relationship with Wayans. On Daniel's only day on the job, Wayans repeatedly called him a "nigga," mocked his afro hair style, called him a "black fat ass," and derogatively referred to him as "Cleveland Brown," a cartoon character on Fox's "Family Guy." The next day Wayans juxtaposed pictures of Daniels and Cleveland Brown on his website, with the caption: "Tell me this nigga don't look like ... THIS NIGGA!!!."

Daniels sued for racial harassment and other things. Wayans filed a motion to dismiss, using California's anti-SLAPP statute (C.C.P. Section 425.16). Under that statute, a defendant like Wayans may obtain early dismissal if he shows that plaintiff's claims arose from "protected activity," including the exercise of First Amendment rights. Once that showing is made, the burden shifts to plaintiff, who needs to demonstrate with admissible evidence — before formal discovery begins — that he has a reasonable probability of prevailing on the merits.

Wayans argued that his language was "protected" under the First Amendment because the improvisational nature of his

New York Times News Service

Marlon Wayans in 2013.

"creative process" includes the use of raunchy, racially laden epithets and jokes towards others on the movie set, even when the cameras are not rolling. The court agreed.

In reaching this conclusion, the court was on strong ground. Since *Lyle v. Warner Brothers*, 38 Cal.4th 264 (2006), which involved alleged sex harassment arising from coarse language in the writers' room of the TV show "Friends," courts are required to give a wide berth to writers and other artists who testify that their use of vulgar and otherwise harassing language in the presence of other employees is integral to their creative process. And there is no real rejoinder to this kind of attestation. Just as, in the religious discrimination arena, it is virtually impossible to challenge the sincerity of an employee's declaration of religious belief, in the world of media, it is virtually impossible to challenge an artist who says he must be obnoxious and offensive in order to get his creative juices flowing.

It was at step-two of the anti-SLAPP test, however, when Daniel had to establish a reasonable likelihood of prevailing on the merits of his harassment claim, that the court's analysis became problematic. To show racial harassment, a plaintiff must generally satisfy both a subjective and objective test. The alleged harassment must have been subjectively unwelcome. It also must have unreasonably interfered with work performance by creating an environment that was objectively "intimidating, hostile, or offensive." The analysis is made from the perspective of a "reasonable employee" belonging to plaintiff's protected class (in Daniel's case, black men).

Relying on a curious combination of academic literature and popular online dictionaries, including a controversial book by Harvard law professor Randall Kennedy, the court held that "nigga" (and perhaps "nigger") is not necessarily a racial slur, but rather, when used by one black man toward another, can be a "term of affection." The court then jumped to the conclusion that the language could not — as a matter of law — have been unreasonably offensive to Daniel. Context, including cultural context, rules. A reasonable black actor cannot be offended by use of this language because he likely would have been familiar with Wayan's salty lexicon and because he was a member of a class — black men — who call each other "nigga" and even "nigger" with endearment and affection.

The court's logic in reaching its conclusion is confused and confusing. For one thing, at best the court found these words, when used intra-racially, to be "arguably racist" and "not unambiguous." It also acknowledged (albeit in a footnote) that, Professor Kennedy aside, many black persons continue to find these terms to be vile and reprehensible expressions of racial hatred. There was simply not a clear consensus that these words are now "terms of endearment" when used between black men. By generalizing about the "reasonable black man" as it did, the court engaged in precisely the type of racial stereotyping that FEHA condemns. This irony seems entirely to have escaped the court. If anything, it should have caused the court to scrutinize the "reasonable person" standard as used in the harassment objective test, and given some serious thought to how that concept can be best constructed.

Second, in reaching its conclusion, the court relied heavily on Wayan's and his co-stars' testimony that he used the word as a "term of endearment" and that it was received as such. But Wayan's description of his subjective intent in using this word, and his black and white co-stars' testimony that they subjectively considered it to be a term of endearment, are not proper measures of objective offensiveness. Inexplicably, the court considered Wayan's and his co-stars' subjective opinions, but not Daniel's. In so doing, the court undermined decades of harassment decisions — mostly in the sex harassment arena — holding that a perpetrator's testimony that he was "only joking" does not count in the "objective" harassment analysis.

The court, so focused on context when considering intra-racial use of these words, completely ignored a different contextual framework: that the workplace is a more coercive environment than other social settings, and that employment is a state of legal subordination. Anti-discrimination laws are designed to protect employees who need their jobs to make a living. They do not have the same freedom to leave work that they have to walk out of a bar when confronted with offensive language. We may love Don Rickles when he is doing his show at Ceasar's Palace. But the Court of Appeal has now invited him into the workplace.

Also disappointing is any sign from the majority that this was at least a difficult case to decide. Given the provocative nature of the subject matter, and the deleterious impact the decision may have on the future exercise of civil rights, some humility would have been in order.

And a final word of warning to plaintiffs. When bringing harassment and discrimination claims against the entertainment industry, it's best to avert the inevitable anti-SLAPP motion by filing in federal court using federal rather than state anti-discrimination laws. *See Bulletin Displays v. Regency Outdoor Advertising*, 448 F.Supp.2d 1172 (C.D.Cal. 2006). There is no reason to invite this kind of litigation if it can so easily be avoided.

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