

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 AUGUST TERM, 2009

4 (Argued: December 4, 2009

Decided: August 13, 2010)

5 Docket No. 09-1306-cv

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7 JOAN PUCINO,

8 Plaintiff-Appellant,

9 DEBORA COLE and MARYANNE DAUER,

10 Plaintiffs,

11 v.

12 VERIZON COMMUNICATIONS, INC.,

13 Defendant-Appellee.
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15 B e f o r e: WINTER, RAGGI, and LIVINGSTON, Circuit Judges.

16 Appeal from a judgment of the United States District Court
17 for the Southern District of New York (Paul G. Gardephe, Judge)
18 granting defendant's motion for summary judgment dismissing
19 appellant's hostile work environment claim. We vacate and
20 remand.

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16 WINTER, Circuit Judge:

17 Joan Pucino appeals from Judge Gardephe's grant of summary
18 judgment dismissing her claim that Verizon Communications, Inc.,
19 maintained a hostile working environment at the garage where she
20 was employed. We vacate and remand.

21 BACKGROUND

22 a) Factual Background

23 Given that this appeal is from a grant of summary judgment,
24 we view the evidence in the light most favorable to appellant.
25 See Beyer v. Cnty. of Nassau, 524 F.3d 160, 163 (2d Cir. 2008).
26 Our recitation of the facts, therefore, is simply a description
27 of the evidence appellant proffered in opposition to the motion
28 for summary judgment.

29 Pucino began working for Verizon's predecessor company in
30 1982, at first as a long-distance operator and then, from 1991
31 until the end of 2002, as a field technician in Newburgh, New
32 York. Field technicians install and repair telecommunications

1 cable. Pucino worked at Pierce's Road Garage from 1991 to 1995
2 and was then transferred to the Union Avenue Garage, where she
3 worked until her retirement in December 2002. The Union Avenue
4 Garage employed anywhere from sixty to one-hundred-and-ten field
5 technicians at a time during this period, but never more than
6 five of them were women at any one time.

7 Justin Hinspeter and Kevin Moore served as foremen at the
8 Union Avenue Garage between 1995 and 2001. Foremen were
9 responsible for assigning work and equipment to technicians and
10 for monitoring the quality of that work. Hinspeter and Moore
11 routinely assigned her work that was less desirable than the work
12 assigned to male workers. Pucino was frequently assigned to work
13 alone in parts of Newburgh considered unsafe. Men were never
14 assigned to work alone in those areas. Hinspeter and Moore also
15 insisted that Pucino first call one of them when she needed
16 assistance on a job, while the two foremen allowed male workers
17 to call directly to dispatch for help. The foremen often refused
18 Pucino's requests for help when she called and would instead show
19 up to monitor her work. On several occasions, Hinspeter would
20 deny Pucino's requests for assistance on the ground that no one
21 was available to help but then, in Pucino's presence, would grant
22 a male worker's request for help. Hinspeter told Pucino to "get
23 lost" and to "go kill herself" on occasions when she pointed out
24 this inconsistency in treatment.

1 Pucino also stated that Hinspeter would routinely change her
2 work location even though it was common practice to allow
3 technicians to work continuously in one area of the city so that
4 they could become familiar with it. On at least ten occasions,
5 Hinspeter skipped over her when it was her turn to receive
6 overtime work, even though such work was usually assigned equally
7 to all field technicians on a rolling basis.

8 Two of Pucino's co-workers corroborated Pucino's account of
9 Hinspeter's behavior with respect to work assignments. Maryanne
10 Dauer stated that Hinspeter also sent her into two-man areas of
11 Newburgh alone even though men never had to work there alone.
12 Dauer received such assignments about once a week while working
13 out of the Union Avenue Garage. Robert Burton, a male coworker
14 in the Union Avenue Garage, stated that he had observed Hinspeter
15 and Moore harass Pucino when she requested assistance on
16 assignments that were routinely "two-man" jobs. Hinspeter once
17 threatened Burton with discipline because he had asked Pucino to
18 help him out on a project where the use of a second worker was
19 routine and never questioned by the foremen. Hinspeter even
20 warned Burton to stay away from Pucino, saying that Pucino was
21 "trouble." He thereafter questioned Burton closely whenever
22 Burton worked with Pucino.

23 Beyond work assignments, Pucino stated that, on many
24 occasions, Hinspeter would grant her male co-workers access to

1 the very tools that he had just told her were unavailable. She
2 specifically recalled one occasion when Hinspeter granted Andy
3 Embler's request for a "B tool" (used to open boxes) when he had
4 denied the same request from her moments earlier. Denial of
5 tools made it difficult, if not impossible, for her to perform her
6 work properly.

7 The Verizon foremen routinely denied Pucino access to bucket
8 trucks even though she was eligible for them under company
9 policy. A bucket truck is a large pick-up truck equipped with an
10 enclosed platform attached to a mechanical arm that, when lifted,
11 makes it possible to reach overhead telecommunications wires.
12 Field technicians prefer bucket trucks to the alternative -- vans
13 with large ladders -- because the trucks are safer, easier to
14 use, and reach much higher. Because of their desirability, the
15 foremen made permanent and temporary bucket truck assignments to
16 men based on seniority. Pucino stated that foremen at both
17 Pierce's Road Garage and Union Avenue Garage would frequently
18 deny her requests for a bucket truck notwithstanding her
19 seniority over the male co-workers who received them. She
20 specifically recalled that co-workers Ted Saltershack, Paul
21 Martinex, and Bob Wilkens received bucket truck assignments even
22 though she had more seniority than any of them. Pucino also
23 stated that the few trucks she did receive were older and in
24 worse shape than those assigned to less senior males and that

1 even these trucks were soon given away to other workers or else
2 taken out of service because of their age.

3 Dauer described a similar experience with bucket truck
4 assignments. Dauer worked at Pierce's Road Garage from 1995
5 until July 2001, when she was transferred to the Union Avenue
6 Garage along with co-worker Danny Piperato. Both Dauer and
7 Piperato took their permanently-assigned trucks with them. Upon
8 Dauer's arrival at the Union Avenue Garage, Hinspeter gave her
9 truck to a male worker with more seniority while allowing
10 Piperato to keep his truck at the expense of more senior males.
11 Dauer further recalled that many of her requests for a temporary
12 bucket truck were denied in favor of less senior male workers.

13 Pucino stated that Hinspeter and Moore often reprimanded her
14 for behavior that was commonplace, and unremarked upon, among the
15 men. For example, although there was no company policy against
16 using public bathrooms and male co-workers openly used them while
17 out in the field, Hinspeter and Moore reprimanded Pucino for
18 being "off the job" on occasions when she used public facilities.
19 Pucino preferred public bathrooms because the bathrooms where she
20 worked were unisex, generally dirty, and also lacked doors or
21 other security to prevent men from walking in. Dauer also
22 attested to the bad conditions of Verizon's unisex bathrooms.
23 Dauer stated that, while working at Pierce's, she became aware of
24 the "off the job" reprimands Pucino had received for using public

1 bathrooms. Fearing similar discipline, Dauer began to document
2 her own travel time to bathrooms in Verizon offices several miles
3 from where she worked, which were segregated by sex.

4 As another example of discriminatory discipline, Pucino
5 testified that Hinspeter and Moore had reprimanded her for
6 stopping at a store for a cold drink, even though it was
7 commonplace for male workers to do the same on hot days. The
8 foremen then implemented a new policy prohibiting such stops and
9 openly blamed Pucino for that policy.

10 Finally, Pucino stated that Hinspeter and Moore subjected
11 her to harsher, more public criticism than male co-workers.
12 Hinspeter "constantly" called Pucino a "bitch" and "stupid" and
13 also would tell her to "go fuck herself." And while male workers
14 were usually criticized privately for their mistakes, Pucino's
15 affidavit claimed that Hinspeter and Moore had repeatedly singled
16 her out for intense and often public criticism.

17 There was evidentiary corroboration of these claims.
18 Gregory Irvin, a union shop steward who observed the workplace,
19 said that Hinspeter would insult male co-workers by calling them
20 "just as productive as [Pucino]." Irvin further said that
21 "Hinspeter singled [Pucino] out for rougher, longer and more
22 vicious treatment than anyone else." Burton stated that
23 Hinspeter and Moore "constantly" watched Pucino, "far in excess"
24 of their supervision of any male coworker in the same work group.

1 Dauer, for her part, testified that Hinspeter subjected her to
2 much the same treatment. For example, Hinspeter reprimanded her
3 for spending too much time on a "no-access" job even though her
4 male co-workers spent the same amount of time on that job without
5 receiving any criticism.

6 The public criticism of Pucino persisted even after she
7 filed a complaint with Verizon's internal Equal Employment
8 Opportunity ("EEO") Hotline. Moore publicly announced to the
9 Union Avenue Garage that Pucino had filed the complaint with the
10 internal EEO Hotline. He then told workers that, because of
11 Pucino's EEO complaint, "they are going to come into our garage,
12 take over our garage. Every word is going to be scrutinized.
13 You are going to be followed, and the garage will never be the
14 same." Two days later, someone in the Union Avenue Garage placed
15 a large dead snake in Pucino's work truck.

16 b) Procedural History

17 Pucino and Dauer filed Equal Employment Opportunity
18 Commission ("EEOC") charges against Verizon on March 30, 2001 and
19 the two filed suit on July 8, 2003 alleging gender discrimination
20 in violation of 42 U.S.C. § 2000e ("Title VII") and the New York
21 State Human Rights Law, New York Executive Law § 296 ("NYSHRL").¹

¹Debora Cole, another female coworker, filed suit with Pucino and Dauer. The district court issued a separate order granting summary judgment to Verizon on Cole's claims and, like Dauer, Cole has not appealed.

1 The district court granted Verizon's motion for summary judgment.
2 Dauer did not appeal. Pucino appeals only from the grant of
3 summary judgment on her hostile workplace claim. We therefore
4 limit our inquiry to that claim.

5 DISCUSSION

6 "We review a district court's grant of summary judgment de
7 novo." See Beyer, 524 F.3d at 163. Summary judgment is
8 appropriate only if "the pleadings, the discovery and disclosure
9 materials on file, and any affidavits show that there is no
10 genuine issue as to any material fact and that the movant is
11 entitled to judgment as a matter of law." Fed. R. Civ. P.
12 56(c)(2). In deciding whether the district court erred, we must
13 "construe the facts in the light most favorable to the non-moving
14 party and must resolve all ambiguities and draw all reasonable
15 inferences against the movant." Beyer, 524 F.3d at 163 (internal
16 quotation marks omitted).

17 a) Title VII Hostile Work Environment Claim

18 In the present procedural context, Pucino's hostile work
19 environment claim requires her to proffer sufficient evidence to
20 allow a trier of fact to find disparate treatment based on
21 gender, resulting in a hostile working environment that was
22 "sufficiently severe or pervasive to alter the conditions of the
23 victim's employment and create an abusive working environment
24" Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)

1 (internal quotation marks omitted).²

2 1. "Based on Sex"

3 In assessing the "totality of the circumstances" offered to
4 prove a hostile work environment, a fact-finder may consider only
5 abusive conduct proven to be "based on sex." Alfano v. Costello,
6 294 F.3d 365, 378 (2d Cir. 2002); Raniola v. Bratton, 243 F.3d
7 610, 621 (2d Cir. 2001).³ This may be proven by "'harass[ment]
8 in such sex-specific and derogatory terms . . . [as] to make it
9 clear that the harasser is motivated by general hostility to the
10 presence of women in the workplace,'" Raniola, 243 F.3d at 621
11 (alteration in original) (quoting Oncale v. Sundowner Offshore
12 Servs., Inc., 523 U.S. 75, 80 (1998)), or by offering "some
13 circumstantial or other basis for inferring that incidents
14 sex-neutral on their face were in fact discriminatory." Alfano,
15 294 F.3d at 378. A plaintiff may rely on incidents of sex-based
16 abuse to show that other ostensibly sex-neutral conduct was, in
17 fact, sex-based. See Raniola, 243 F.3d at 621-22; see also
18 Howley v. Town of Stratford, 217 F.3d 141, 156 (2d Cir. 2000)

²We review discrimination claims brought under the NYSHRL according to the same standards that we apply to Title VII discrimination claims. See Cruz v. Coach Stores, Inc., 202 F.3d 560, 565 n.1 (2d Cir. 2000).

³Plaintiffs alleging discrimination based on sex must also provide "a specific basis . . . for imputing the objectionable conduct to the employer." Alfano, 294 F.3d at 373. Verizon does not dispute that Pucino could impute the alleged objectionable conduct of the two Verizon foremen to it.

1 (holding that a rational jury could infer that facially-neutral
2 abuse was sex-based because perpetrator had previously made
3 several sexually-derogatory statements).

4 Applying these standards, we conclude that Pucino has
5 offered sufficient evidence to allow a trier of fact to find that
6 the alleged abuse was indeed sex-based.

7 Pucino offered evidence showing that both Hinspeter and
8 Moore subjected women to disparately harsh working conditions.
9 These included the disparate assignment of work in dangerous
10 areas and the refusal to provide assistance to female workers
11 that was provided male co-workers. Verizon has proffered no
12 evidence suggesting a legitimate non-discriminatory explanation
13 for the foremen's conduct.

14 A trier of fact could also find disparate treatment based on
15 gender in the provision or denial of tools and the use of bucket
16 trucks. There was similar evidence with regard to access to
17 public restrooms by male and female employees that would allow a
18 trier of fact to conclude there was an attempt to force female
19 employees to use restrooms that had no locks.

20 Pucino also offered evidence sufficient to allow a trier to
21 find that Hinspeter and Moore engaged in verbal attacks on Pucino
22 that were sex-based. In that regard, Pucino and the EEOC suggest
23 that the word "bitch" is such an intensely degrading sexual
24 epithet that its use implies as a matter of law hostility toward

1 women. It surely is the case that use of that word in many
2 contexts reflects such hostility. However, we cannot say that
3 use of the word "bitch" always and in every context has that
4 meaning or that its usage need not be viewed in context. See
5 Kriss v. Sprint Commc'ns Co., 58 F.3d 1276, 1281 (8th Cir. 1995);
6 see also Yuknis v. First Student, Inc., 481 F.3d 552, 555 (7th
7 Cir. 2007) ("[A] gender-specific term of abuse, such as 'son of a
8 bitch,' need not imply hostility based on the abused person's sex
9 any more than saying 'she is a bad worker' need imply hostility
10 based on her sex.") (internal citation omitted). We also see no
11 need to worry that a trier of fact cannot make the appropriate
12 judgment about the word's use. We therefore reject a rule that
13 would automatically command an inference of gender-based
14 hostility to be drawn from its use.

15 Having said that, we also have no doubt that such a trier
16 could find that Hinspeter's "constant" use of the word over
17 several years in the context of the present record was sex-based
18 and reflected hostility to women. See EEOC v. PVNF, L.L.C., 487
19 F.3d 790, 799 (10th Cir. 2007) ("[Defendant] frequently made
20 indisputably gender-related remarks, and tolerated the use of the
21 word 'bitch' to describe [plaintiff]. Under these circumstances,
22 we think a jury should decide whether these comments were made
23 because of gender animus.").

1 We also conclude that the combination of disparate treatment
2 and gender-based verbal abuse here can support a further
3 inference that the other complained-of instances of abuse
4 involving the two foremen were in fact gender-based. "There is
5 little question that incidents that are facially sex-neutral may
6 sometimes be used to establish a course of sex-based
7 discrimination -- for example, where the same individual is
8 accused of multiple acts of harassment, some overtly sexual and
9 some not." Alfano, 294 F.3d at 375. Here, even if incidents,
10 such as the denial of overtime, did not directly amount to
11 disparate treatment when considered alone in isolation, an
12 inference that such conduct was gender-based could be drawn by a
13 trier because Hinspeter and Moore were behind them.

14 Notwithstanding the above analysis, Verizon argues that the
15 evidence upon which Pucino relies is simply too conclusory to
16 support an inference that the conduct in question was gender-
17 based. We disagree. While "purely conclusory allegations of
18 discrimination" that are devoid of "concrete particulars" do not
19 suffice to avoid summary judgment, Meiri v. Dacon, 759 F.2d 989,
20 998 (2d Cir. 1985), Pucino has proffered detailed evidence that
21 Hinspeter and Moore treated similarly-situated male and female
22 workers differently, including the accounts of others who
23 witnessed such conduct. For that reason, we conclude that Pucino

1 has proffered evidence sufficient to show gender-based discrimination.

2 2. Objective & Subjective Hostility

3 We turn now to whether a rational juror could find that the
4 gender-based conduct in question was "sufficiently severe or
5 pervasive to alter the conditions of the victim's employment and
6 create an abusive working environment." Harris, 510 U.S. at 21
7 (internal quotation marks omitted). The relevant inquiry focuses
8 on both objective and subjective hostility: "A work environment
9 will be considered hostile if a reasonable person would have
10 found it to be so and if the plaintiff subjectively so perceived
11 it." Brennan v. Metro. Opera Ass'n, 192 F.3d 310, 318 (2d Cir.
12 1999). Relevant circumstances include: "the frequency of the
13 discriminatory conduct; its severity; whether it is physically
14 threatening or humiliating, or a mere offensive utterance; and
15 whether it unreasonably interferes with an employee's work
16 performance." Harris, 510 U.S. at 23. In establishing this
17 element, a plaintiff need not show that her hostile working
18 environment was both severe and pervasive; only that it was
19 sufficiently severe or sufficiently pervasive, or a sufficient
20 combination of these elements, to have altered her working
21 conditions. See Terry v. Ashcroft, 336 F.3d 128, 148-49 (2d Cir.
22 2003); see also Brennan, 192 F.3d at 318 ("[A] plaintiff must
23 still prove that the incidents were 'sufficiently continuous and
24 concerted' to be considered pervasive, or that a single episode

1 is 'severe enough' to establish a hostile working environment.")
2 (internal citation omitted). And again, in addressing this
3 question, we consider the totality of circumstances. See Terry,
4 336 F.3d at 148-49.

5 The district court concluded that the challenged conduct
6 amounted to nothing more than minor annoyances and
7 inconveniences. Verizon once again argues that the record is
8 simply too conclusory and lacking in concrete particulars to
9 avoid summary judgment on the question of objective hostility.
10 In particular, it argues that Pucino cannot establish the
11 frequency of the abuse simply by stating in her affidavit that
12 the alleged abuse occurred "constantly" or "frequently."

13 We disagree. We believe that a trier might easily find that
14 the harassment and abuse was sufficiently severe to alter
15 Pucino's working conditions. Work assignments, the provision of
16 tools, the use of a bucket truck, the issues as to use of
17 restrooms, and the verbal abuse affected most of the major
18 aspects of Pucino's employment.

19 With regard to the conclusions of Pucino's evidence as to
20 the frequency of the abuse, a plaintiff, to prevail, need not
21 recount each and every instance of abuse to show pervasiveness.
22 In Torres v. Pisano, 116 F.3d 625 (2d Cir. 1997), a plaintiff
23 testified that a supervisor "constantly harassed her -- so often
24 that she 'lost count' -- but that she could recall the exact

1 dates and circumstances of only a few incidents of harassment.”
2 Id. at 631. In discussing the district court’s grant of summary
3 judgment, we explained that “If a jury were to credit [the
4 plaintiff’s] general allegations of constant abuse, which were
5 confirmed by her coworkers, it could reasonably find pervasive
6 harassment, even in the absence of specific details about each
7 incident.” Id.; see also Holtz v. Rockefeller & Co., 258 F.3d
8 62, 75 (2d Cir. 2001) (crediting testimony in support of a
9 hostile work environment claim that plaintiff was “constantly” or
10 “daily” made the victim of unwanted physical contact); Brennan, 192
11 F.3d at 318 (explaining that “[a] plaintiff need not present a
12 list of specific acts”). Pucino’s evidence fits within the
13 Torres precedent. She has described the nature of the alleged
14 abuse in some detail. Although she omitted specifics as to the
15 date and circumstances of each instance of abuse, her testimony
16 was corroborated by other witnesses, including Dauer, Burton, and
17 Irvin. We thus conclude that Pucino’s evidence was sufficient to
18 allow a trier to find pervasiveness.

19 Accordingly, we hold that a rational juror could find the
20 treatment of Pucino to be sufficiently severe or sufficiently
21 pervasive to alter the conditions of her employment.

22 CONCLUSION

23 We therefore vacate and remand for further proceedings
24 consistent with this opinion.