

MAR 18 2008

*Hubbard v Bimbo Bakeries 06-35981*CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

BERZON, Circuit Judge, dissenting:

I agree with the majority for the most part, but would remand for trial on the hostile work environment cause of action. On this summary judgment record, a reasonable trier of fact could find the offensive conduct to which Hubbard was exposed both sex-based and sufficiently severe and pervasive to amount to actionable sexual harassment under 42 U.S.C. § 2000e-2(a)(1) and O.R.S. § 659A.030. I would not rely for this conclusion on Felty's remark regarding wanting a "relationship" with Hubbard, which a reasonable person in Hubbard's position would not construe as sexually suggestive. But there was other conduct — remarks, suggestively close invasion of Hubbard's "space," and "smooching sounds" — that occurred over about a year, culminating in the incident in which Felty drove a truck dangerously close to Hubbard and then made remarks that a reasonable person could construe as a crude sexual proposition.

It may well be that this conduct, if it occurred at all, was both meant and understood as expressing purely personal animosity through crude behavior and language, rather than sex-based propositions or hostility. But that would be a question for trial.

I note as well that on Hubbard's version of events, it appears that he raised

his concerns with his supervisors sufficiently to trigger a responsibility to take action to eliminate the harassment. *See Nichols v. Azteca Restaurant Enters., Inc.*, 256 F.3d 864, 875 (9th Cir. 2001). Johnson and Kanyo deny Hubbard's account, maintaining that Hubbard's complaints about Felty did not include the sexual conduct now alleged, and that he did not complain about Marshall at all. Such divergent accounts of plainly material facts can only be resolved at trial.

I respectfully dissent.