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EMPLOYMENT LAW

Certain Conduct Doesn't Qualify as Adverse Employment Action

BY SID STEINBERG

Special to the Legal

Last week, the U.S. District Court for the Eastern District of Pennsylvania held in *Rosati v. Colello*, No. 14-2402, 2015 U.S. Dist. LEXIS 44069 (E.D. Pa. Apr. 2, 2015), that a former employee cannot meet his or her burden of showing a prima facie case of gender discrimination, hostile work environment, or retaliation under Title VII of the Civil Rights Act of 1964 when the alleged “adverse employment actions” were isolated and not severe and pervasive enough to alter the compensation, terms, conditions, or privileges of his or her employment.

ROSATI'S EMPLOYMENT HISTORY

Patricia Rosati was a crime prevention officer in the Eighth Police District in the city of Philadelphia. Rosati took multiple leaves of absence under the Family and Medical Leave Act from 2005 through 2014 and often worked on restricted duty as the result of pregnancy or pregnancy-related conditions, according to the



SID STEINBERG is a partner in Post & Scbell's business law and litigation department. He concentrates his national litigation and consulting practice in the field of employment and employee relations law. Steinberg has lectured extensively on all aspects of employment law, including Title VII, the FMLA and the ADA.

opinion. In February 2012, Rosati asked her immediate commander, Sgt. Michael Colello, for time off to go to a doctor's appointment, to which Colello responded by asking if she “was going to get fixed,” the opinion said. Despite these remarks, Rosati was granted the time off she requested, but she reported Colello's comments to her lieutenant. Later that same month, Rosati informed Colello she was pregnant, to which he responded by asking whether she “was keeping the baby,” the opinion said. Colello also apparently made comments on a weekly basis about Rosati's shifts and child care needs.

Months later, on May 2, 2012, apparently frustrated with

Rosati's history of being placed on restricted duty because of pregnancy-related restrictions, Colello remarked that Rosati would need more time off due to her child receiving an award. Colello also cursed at Rosati, made nepotism-related accusations, and made additional derogatory remarks about Rosati's sex at this time, the opinion said. After this incident, Colello requested that disciplinary action be taken against Rosati for insubordination. Capt. Leonard Ditchkofsky, the Eighth District's commanding officer, investigated Colello's request but did not complete the investigation. No action was ever taken against Rosati as a result of Colello's request.

Around the same time, Ditchkofsky refused to grant Rosati's request to work one week a month on a night shift, but did permit another male officer to do so. Ditchkofsky did not permit Rosati to work night shifts because the city required all crime prevention officers to work day shifts and Rosati's pregnancy-related work restrictions prohibited her from working nights.

Rosati also alleged that Colello assigned her additional monthly assignments in comparison with her male counterparts, the opinion said.

On May 29, 2012, Rosati was re-assigned to a different platoon, but, due to her restricted duty status and pending maternity leave, she would continue to work her same schedule at her same location. On May 30, 2012, Rosati filed her first charge of discrimination with the Pennsylvania Human Relations Commission (PHRC).

Almost 15 months later, in August 2013, Rosati requested maternity leave for the birth of her fifth child. Apparently, this request “became lost during the approval process,” the opinion said. Rosati complained that Ditchkofsky deliberately threw out or destroyed the request in retaliation for filing the PHRC charge against Colello. The Internal Affairs Bureau investigated and did not sustain or substantiate that charge against Ditchkofsky. Rosati’s maternity leave was approved.

Rosati then filed a second complaint with the PHRC on March 5, 2014, and on March 29, 2014, she was directed by her supervisor to resubmit a request to extend her restricted duty status to correct certain deficiencies, according to the opinion. Rosati submitted the corrected request, which was approved.

On April 3, 2014, Rosati was issued a non-disciplinary counseling form regarding her request to extend her restricted duty status for “not following the chain of command,” the opinion said. These type of counseling forms are used by the department for training

purposes and they do not result in any disciplinary action being taken against an employee, nor do they influence an employee’s eligibility for promotions or raises. However, the form notes that a continued failure to abide by the department’s policy could result in future disciplinary action.

The court found the isolated nature of the alleged conduct prevented Rosati from maintaining a hostile work environment claim.

CITY’S CONDUCT INSUFFICIENT FOR ACTIONABLE CONDUCT

Rosati filed suit alleging employment discrimination and gender discrimination, a hostile work environment, and retaliation for protected Title VII and Pennsylvania Human Relations Act activity. After the close of discovery, the defendants moved for summary judgment on all of Rosati’s claims, arguing that Rosati did not establish a prima facie case for discrimination, hostile work environment, or retaliation because the conduct alleged by Rosati, even if true, was not serious and tangible enough to alter an employee’s compensation, terms, conditions, or privileges of employment to rise to the level of an adverse employment action.

The court agreed and summary judgment was granted. Specifically, the court held that

an employee cannot, as a matter of law, maintain a Title VII case for discrimination, hostile work environment, or retaliation under the facts as alleged by Rosati. Ultimately, the court held that unnecessary derogatory comments, a refusal of the employer to change a work schedule, increased work assignments, an investigation into an employee’s conduct that does not result in any negative consequences to the employee, re-assignment to another platoon, and the issuance of non-disciplinary counseling forms do not constitute adverse employment actions under the law. Additionally, the court found the isolated nature of the alleged conduct prevented Rosati from maintaining a hostile work environment claim because offhand comments and isolated incidents—unless extremely serious—do not rise to the level of discriminatory changes in the terms and conditions of employment.

This case highlights the emphasis courts place on the employer’s alleged conduct in discrimination claims and emphasizes that despite an employee’s perception, minor actions, such as lateral transfers, changes of title and reporting relationships, increased workloads, and other actions that carry no negative consequences, are generally insufficient to constitute adverse employment actions under the law. •