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EMPLOYMENT LAW

Third Circuit Addresses 'Severe and Pervasive' Workplace Behavior

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Special to the Legal

How "severe" an offensive workplace must be to rise to the level of actionable harassment is an ongoing balancing act by courts in the Third Circuit. While the language courts use is well-known, and comes from U.S. Supreme Court cases, the application of that language is often the subject of nuanced interpretation. The U.S. Court of Appeals for the Third Circuit's recent decision in *Greer v. Mondelez Global*, No. 12-3820, 2014 U.S. App. LEXIS 20529 (3d Cir. Oct. 22, 2014), is the latest case to keep the "severity" bar at a high level for individuals claiming that they have been harassed in the workplace.

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CO-WORKER HARASSMENT

Marilyn Lennox was a supervisor working for Kraft Foods' Philadelphia bakery from September 2008 until November 2009. Lennox, who is African-American, claimed that during her employment, she was subjected to a series of racially and sexually discriminatory comments and actions from her co-workers, which ultimately forced her to resign her position, according to the opinion. Specifically, two co-workers were alleged to have made various racial comments to Lennox about, for example, the fact that she probably voted for President Obama, listened to rap music, and lived in a "rough area." Lennox was also present when a colleague made a racially offensive joke—although it was not directed at her, the opinion said.

These two co-workers also made (arguably) sexist comments, including referring to Lennox as being "prissy" and a "princess," as well as telling her the reason she did not have a boyfriend was because she was hard-headed. Lennox also observed a pornographic magazine in the workplace and a "sexually suggestive image" that was posted in the break room, the opinion said.

Additionally, Lennox referenced a number of workplace incidents that had no specific correlation to either her race or gender, such as a colleague telling her that a co-worker "did not like her," the opinion said.

BEHAVIOR STOPS AFTER COMPLAINTS

Lennox asserted that the racial incidents occurred between November 2008 and January 2009 and that she complained about them in February and March of that year. There was no dispute that in response to her complaints, management met with the offending employees and directed them to stop their behavior. Lennox reported no offensive behavior after March 2009.

Lennox worked until October 2009, when she was approached about training for a promotion. Not only did Lennox not accept this opportunity, but she resigned shortly thereafter. Lennox brought suit claiming that she had been harassed on the basis of her race and gender and had been retaliated against in violation of Title VII. The district court granted summary judgment to Kraft and Lennox appealed.

HARASSMENT DEFINED

The Third Circuit began its discussion of Lennox's harassment claim by noting that "a hostile work environment is actionable under Title VII only if it is so severe and pervasive that it alters the conditions of the victim's environment and creates an abusive working environment." The court noted that "the threshold for pervasiveness and regularity of discriminatory conduct is high." The environment must be more than "hostile in the plaintiff's view," but must be "objectively hostile." Moreover, "offensive comments, jokes and jibes" are insufficient to state a Title VII claim "absent a change in a term, condition or privilege in [the victim's] employment."

NO CHANGE IN WORKING ENVIRONMENT

In light of this rather demanding standard, the court found that Lennox failed to show how the racial comments were "objectively hostile acts that altered the terms or conditions of her employment." Nor was Lennox able to demonstrate that her work environment was "permeated with discriminatory intimidation, ridicule and insult." As such, the comments were "unprofessional" but did not "constitute an objective change in the conditions of her employment."

Although Lennox may have wanted more severe action taken against her harassers, the company fulfilled its legal obligation.

Although the court found that the environment was not harassing as a matter of law, it also found that Lennox could not establish respondeat superior liability, inasmuch as "Kraft's response addressed Lennox's concern and was reasonably calculated to prevent further harassment." While Kraft may not have taken more severe action toward the offending employees, the company's obligation was to make the harassment stop and its response accomplished that goal.

RETALIATION FAILS

The court also affirmed the dismissal of Lennox's retaliation claim. Under the familiar *Burlington Northern* standard (from *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53, 68 (2006)), the anti-retaliation provision of Title VII covers only actions "that are materially adverse to a reasonable employee or job applicant" and "would dissuade a reasonable worker from making or supporting a charge of discrimination." In this case, Lennox asserted only that her supervisors did not respond to her complaints and that her colleagues' behavior did not improve. This was insufficient to constitute a "materially adverse" change in Lennox's work environment. Further, as noted, the harassing behavior stopped after Lennox brought it to the attention of management.

The case illustrates, in essence, the way the anti-harassment provisions of Title VII are supposed to work. Lennox's colleagues treated her badly (or, as the court called it, "unprofessionally") but the racial and sexual component of the behavior was attenuated. When Lennox complained, Kraft made the behavior stop even though the harassment, at that point, was not actionable. Although Lennox may have wanted more severe action taken against her harassers, the company fulfilled its legal obligation. Lennox's resignation, many months after the company acted to end the offending behavior, appeared unrelated to Lennox's complaints. •

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