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With another court of appeals recognizing a cause of action for retaliatory harassment, employers need to review the scope of their anti-harassment policies and their efforts to monitor retaliation against employees who complain of workplace discrimination.

The Expanding Harassment Umbrella: Retaliatory Harassment Continues to Gain Traction as a Viable Cause of Action

by Theodore A. Schroeder and Rachel A. O'Driscoll

Employers who monitor their potential liability for workplace harassment should add retaliatory harassment to their growing unlawful harassment checklist, if they have not already done so. In a recent decision, the United States Court of Appeals for the Third Circuit held that retaliatory harassment is an adverse employment action under Title VII of the Civil Rights Act of 1964. *Jensen v. Potter*, No. 04-4078 (3d Cir. Jan. 31, 2006). The decision was authored by Judge Samuel Alito on the same day he was sworn in as an Associate Justice of the Supreme Court of the United States.

In reversing the decision of the United States District Court for the Middle District of Pennsylvania, the Third Circuit held that a cause of action predicated upon a hostile work environment is cognizable under the anti-retaliation provisions of Title VII, 42 U.S.C. §2000e-3(a). In doing so, the Third Circuit weighed in on a circuit split by joining a majority of courts of appeals that have recognized such a cause of action.

Letter Carrier Harassed — Twice

Anna Jensen was a letter carrier with the Kingston, Pennsylvania branch of the United States Post Office. Jensen complained to her branch manager, Chris Moss, that while she was working, her supervisor, Carl Waters, sexually propositioned her over the telephone. She claimed Waters had asked her to come to his house telling her, "I want to make love to you all day long." In response to Jensen's complaint, Moss transferred Waters to another branch several days later, and he was eventually fired following an investigation.

Meanwhile, immediately following Waters' transfer, Jensen was moved into Waters' former workstation. Right away, she was subjected to insults by a co-worker who had sided with Waters. He called Jensen names, used obscenities referring to her as "the one who got Waters in trouble," and made loud noises to scare her. Jensen complained to Moss about the co-worker and asked to be moved. She was not moved and the offensive comments continued. Other employees, who apparently also sided with Waters, joined in the harassment, threatening Jensen by driving U-Carts directly at her at high speeds. In addition, on more than one occasion Jensen's car was vandalized in the Post Office parking lot, which had never happened before she complained about Waters. Although Jensen repeatedly complained to Moss about her co-workers' behavior, the harassment continued for 19 months. Finally, Jensen complained to a new supervisor, the co-worker was confronted, and the harassing behavior quickly ceased.

Anti-Retaliation Provision of Title VII is as Broad in Scope as the Anti-Discrimination Provision

Jensen brought a claim of sex discrimination and retaliation under Title VII. Jensen argued that the retaliatory harassment she suffered at the hands of her co-workers was an adverse employment

action in violation of Title VII. The Third Circuit agreed. In addressing whether a retaliation claim could be predicated upon a hostile work environment, the court acknowledged that the issue was one of first impression in the Third Circuit. Further, there is a split of authority among the other courts of appeals on the issue. In reversing the district court's grant of summary judgment for the employer, the court sided with the majority of courts of appeals and found that retaliatory harassment, if severe or pervasive, could be an adverse employment action under Title VII. The Court's decision aligns the Third Circuit with the First, Second, Fourth, Sixth, Seventh, Ninth, and Tenth circuits. The opposing minority view, held by the Fifth and Eighth circuits, limits the anti-retaliatory provision of Title VII to prevent "ultimate employment decisions" and holds that harassment is not within the reach of the statute's anti-retaliation provisions.

The court found that the consistency between the anti-retaliation and anti-discrimination provisions of Title VII provided a statutory basis for a retaliation claim predicated upon a hostile work environment. This holding was grounded in the court's prior recognition that "retaliatory conduct other than discharge or refusal to hire violates Title VII when it alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities or adversely affects his or her status as an employee." The court then noted that a discrimination claim founded on a hostile work environment is well-established based on the "notion that discriminatory ridicule or abuse can so infect the workplace that it alters the terms and conditions of an employee's workplace." It logically follows that, since harassment can be severe or pervasive enough to alter the terms or conditions of employment under the anti-discrimination provision of Title VII, the same must be true under Title VII's anti-retaliation provision.

Employers Not Required to Maintain a Happy Workplace

Claims of retaliatory harassment present challenges for employers. Title VII does not mandate a "happy workplace" but prohibits severe or pervasive harassment. The severe or pervasive standard is critical in the retaliation context. It is inevitable that one employee's claim of discrimination against another will cause a strain on workplace relationships. However, occasional insults, teasing or individual instances of ridicule generally are insufficient to alter the terms and conditions of an employee's workplace. For example, co-workers subjecting the complaining employee to the silent treatment or giving him or her a cold shoulder is not harassment. Likewise, sharing mere expressions of opinion is not retaliatory when standing alone. However, expressions of opinion may be useful in showing that a retaliatory motive animated other behavior. Title VII prohibits retaliation; it does not prohibit other employees from being loyal to the accused or the workplace controversy that may arise following a complaint of discrimination.

What Employers Can Do to Limit Their Exposure to Retaliatory Harassment Claims

In recognizing the similarities between discriminatory and retaliatory harassment, the court also held that the same standard of proof applies to both claims. Therefore, the same defenses and preventive measures available to employers in cases of sexual, racial or other discriminatory harassment will also be available in retaliatory harassment claims. If a plaintiff is able to establish retaliatory harassment arising from the creation of a hostile work environment, he or she must still demonstrate that the employer knew or should have known about the harassment and failed to take prompt and effective action to stop it.

There are several easy and effective steps that employers can take to minimize their exposure to retaliatory harassment claims:

- **Review and Update the Company Anti-Harassment Policy:** Employers should make sure that harassment in retaliation for making complaints of discrimination, or participating in a complaint or investigation of discrimination, is covered by their anti-harassment policy. The policy should include effective mechanisms for employees to report incidents of retaliatory harassment. An employer must promptly and effectively investigate complaints of retaliatory harassment and take steps to put an end to any workplace harassment.
- **Remind Employees of the Anti-Retaliation Policy:** When investigating claims of discrimination, management should remind both complaining parties and witnesses that the company does not tolerate retaliation against employees who complain or participate in an investigation. These individuals should be reminded that this policy includes harassment and of the methods for reporting harassment should it occur.
- **Be Alert to the Potential of Retaliatory Harassment:** Employers must remember that they have not necessarily resolved a claim of discrimination by promptly responding to and remedying the initial complaint. Managers must be trained regarding the potential for lingering problems, including retaliatory harassment, and be ready to respond promptly should such issues arise.

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