

All Federal Court Circuits Now Recognize a Cause of Action for “Retaliatory Hostilework Environment.”

Published Date: June 4, 2012

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Most employers understand that Title VII of the Civil Rights Act precludes a discriminatory “hostile work environment,” in which acts of discrimination against an employee are so severe and pervasive that those acts have an adverse impact on the employee’s ability to do his or her job. What is less fully understood is the fact that an employee also can bring an action under Title VII based upon severe and pervasive retaliatory acts that follow a “protected action” taken by the employee. The 11th U.S. Circuit Court of Appeals -- the last appellate circuit to formally recognize such a cause of action -- recently joined its sister circuits, recognizing a retaliatory hostile environment claim brought by two physicians who had filed EEOC claims against the VA hospital and medical center by which they were employed.

Gowski, et al v. Peake, et al, 11th Cir., No. 09-16371, June 4, 2012.

Doctors Diane Gowski and Sally Zachariah were employed at Bay Pines Veteran’s Affairs (VA) hospital and medical center in Florida. In August 2007, Gowski and Zachariah, along with two other individuals, filed a complaint in federal court against the Secretary of the Department of Veteran’s Affairs, alleging that the hospital’s administration retaliated against them after they each had filed internal complaints of discrimination in 2005 and 2006. At trial, the doctors alleged that the managers and administrators at Bay Pines made a “concerted effort” to retaliate against employees who “opposed their discriminatory or retaliatory actions.” To support that claim, the doctors provided evidence that administrators targeted such individuals by spreading rumors about them, soliciting adverse reports about them from other employees, and warning others that the VA “would not settle frivolous complaints and lawyers would not run the hospital.”

The list of alleged adverse actions against Gowski and Zachariah was extensive, including loss/limitation of practice privileges, misleading/mistaken reports of disciplinary action in personnel files, unwarranted verbal counseling, decrease in salary, and removal from committee positions. The case proceeded to trial, after which the Secretary moved for judgment as a matter of law. That motion was denied, and the jury determined that Gowski and Zachariah had experienced a retaliatory hostile work environment, awarding to Gowski \$250,000 in emotional damages and \$16,000 in lost wages, and to Zachariah, \$1,000,000 in emotional distress and \$90,000 in list wages. The Secretary filed post-trial motions including an argument that discrete acts of retaliation could not form the basis of a claim for retaliatory hostile work environment. The trial court denied that motion, and an appeal to the Eleventh Circuit followed.

Upon review, the Eleven Circuit for the first time recognized a cause of action for retaliatory hostile work environment. It based that determination on the language of Title VII, and the EEOC’s own interpretation of the statute. Further, it found that prohibition of a retaliatory hostile work environment is consistent with Title VII’s remedial goal of preventing supervisors from deterring protected conduct. (During trial of the matter, there was testimony that certain doctors left the hospital rather than report discrimination and work in fear of retaliation.)

Employers generally understand that discrete acts cannot, by themselves, cannot form the basis of a claim of hostile work environment. Therefore, an employee's termination, her denial of transfer, or a refusal to hire does not typically support such a claim. Instead, such claims are based upon acts whose very nature involves repeated conduct: intimidation, ridicule, or repeated insult. The Eleventh Circuit analyzed the claims made by Gowski and Zachariah under that same framework, and found that repeated acts of intimidation and ridicule that followed the doctors' protected claims of discrimination in 2005 and 2006, and that were severe and pervasive enough to alter the doctors' working conditions, could support claims of retaliatory hostile environment.

The message in this case is not a new one, but is important nonetheless. Individuals who take actions protected by Title VII, specifically including a report of workplace discrimination, cannot be retaliated against for that report. In addition, subjecting such an employee to a "thousand small cuts" in the hope that he or she will decide to leave employment is sufficient to lead to liability for retaliatory hostile environment.

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