

CLIENT ALERT

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Third Circuit Recognizes Retaliatory Harassment Claim Under Title VII

In the last opinion that Samuel A. Alito, Jr. authored on the U.S. Court of Appeals for the Third Circuit before becoming an Associate Justice of the U.S. Supreme Court, the court addressed the issue of whether a plaintiff can pursue a Title VII claim against an employer for retaliatory harassment. In *Jensen v. Potter*, the court held that such a claim is cognizable under Title VII. The decision makes clear that employers must not only stop workplace discrimination and harassment, but also any ensuing retaliation against the reporting employee – in whatever form.

The Facts

Plaintiff Anna Jensen worked as a letter carrier in the U.S. Postal Service's Kingston, Pennsylvania branch. On September 15, 2001, she received a telephone call at the branch from supervisor Carl Waters, who had the day off. Waters explained that he had been on an "all-night drinking binge," and invited her to his home. He said, "get out of there right now [because] I want to make love to you all day long." Jensen declined, but Waters asked her to at least join him for breakfast. Jensen again declined. Waters said, "Anna, you put me in a compromising position." Jensen said that her decision was final.

Jensen reported the incident to branch manager Chris Moss. The Postal Service transferred Waters to another branch, initiated an investigation, and subsequently fired him. At the time of the incident, Jensen's workstation was located inside of Moss' office, which facilitated her work following a leg injury. After reporting Waters, Jensen's workstation was relocated to another area of the post office known as Unit 1, where Waters had worked. According to Moss, Jensen was

relocated because her leg had healed and he had confidentiality concerns regarding the pending Waters investigation.

When Jensen arrived in Unit 1, letter carrier Joe Sickler began insulting her. He referred to her as "the [obscenity] who got [Waters] in trouble." Jensen heard Sickler remark that she would have to get off of her "fat [obscenity]" when a new supervisor arrived. Jensen also heard Sickler talking about a petition to bring Waters back and saying that Waters should not have to apologize. On one occasion, Sickler "crept up behind Jensen and clapped two objects together," startling her.

Jensen reported Sickler's conduct to Moss and requested a transfer out of Unit 1. Moss said that he would speak to Sickler, but declined to relocate Jensen, even though another workstation was available. Sickler's conduct continued. For nineteen months, he insulted Jensen approximately two to three times per week with "pounding regularity."

Jensen also faced threatening conduct from letter carrier Ed Jones, who had been her friend before she reported Waters. Jones drove postal carts at Jensen. He also told her that he disagreed with the decision to fire Waters. In addition, about one year after Jensen reported Waters, her car was repeatedly vandalized by unknown individuals in the post office parking lot.

Jensen frequently complained to Moss and another supervisor about her coworkers' conduct and confronted Sickler about his offensive remarks. Conditions did not improve.

Nineteen months after Jensen's first complaint, she complained to a new supervisor, Melissa White. White arranged a meeting with Jensen and Moss, at which Jensen detailed her coworkers' conduct.

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White, Moss, and union officials then confronted Sickler, and the mistreatment of Jensen stopped.

During the nineteen month period, Jensen suffered panic and asthma attacks and took sick time because of stress. She attributed these problems to her working conditions.

The Trial Court

Jensen filed a lawsuit asserting, *inter alia*, a Title VII claim against the Postal Service for retaliation under 42 U.S.C. § 2000e-3(a) (prohibiting discrimination against an employee because the employee “has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]”). The trial court granted the Postal Service’s motion for summary judgment and dismissed Jensen’s lawsuit.

The Third Circuit

On appeal, Jensen argued that the Postal Service was liable for the hostile work environment that her coworkers had created in retaliation for her reporting Waters. The Postal

Service argued that a retaliation claim based upon a hostile work environment is not actionable under Title VII. According to the Postal Service, only a tangible employment action, such as a discharge or demotion, could constitute retaliation. This argument is consistent with holdings of the Fifth and Eighth Circuits, which limit § 2000e-3(a) to “ultimate employment decisions.”

Joining the First, Second, Fourth, Seventh, Ninth, Tenth and Eleventh Circuits, however, the Third Circuit concluded that the claim is actionable. The court explained that the statutory basis for the claim “is the notion that discriminatory ridicule or abuse can so infect a workplace that it alters the terms or conditions of the plaintiff’s employment.” According to the court, harassment that is sufficiently severe or pervasive to create a hostile work environment can form the basis for both discrimination and retaliation claims under Title VII.

The court explained that its “usual hostile work environment

framework applies equally to Jensen’s claim of retaliatory harassment.” Thus, she was required to demonstrate: (1) she suffered intentional discrimination because she engaged in protected activity (here, complaining about Waters); (2) the discrimination was severe or pervasive; (3) she was detrimentally affected by the discrimination; (4) a reasonable person would have been detrimentally affected by the discrimination; and (5) there is a basis for employer liability. After applying this framework, the court reversed summary judgment on Jensen’s retaliation claim.

Conclusion

The *Jensen v. Potter* decision clarifies that retaliatory harassment claims are cognizable under Title VII in the Third Circuit. Even more importantly, *Jensen* illustrates that employers must be vigilant not only to stop harassing or discriminatory misconduct – as the Postal Service did when it transferred and then fired Waters – but also to prevent retaliation against the employee reporting such conduct, including retaliatory harassment, which can be just as costly.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

CEPA Amendments

Effective January 12, 2006, New Jersey’s Conscientious Employee Protection Act was amended to provide that the Act’s protection of employee-whistleblowers extends to employees who disclose, threaten to disclose, object to, or refuse to participate in employer conduct “involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity.” The Act now also expressly protects employees who blow the whistle on “fraudulent or criminal” employer conduct.

CEPA’s remedies provisions have also been modified. There is now no cap on the punitive damages available under CEPA. Moreover, in considering punitive damages awards, a jury or court is now required to contemplate not only the harm suffered by the plaintiff, but the harm suffered by third parties such as shareholders, clients, patients, and the public. Courts are also now required in CEPA cases, “where appropriate,” to order injunctive relief, reinstatement, compensatory damages, and attorneys’ fees. Civil fines for CEPA violations have also been increased.

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