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The plaintiff's claim stems from events at the Supervalu distribution center in Hopkins. (File photo)

Court recognizes hostile environment claim

Retaliatory harassment by co-workers alleged

By: Barbara L. Jones September 16, 2021

Some Black employees at Supervalu distribution center in Hopkins have found a hostile work environment at the least, and a threatening and dangerous one on occasion.

One has sued Supervalu for discrimination and retaliation based on race and natural origin, both for the actions of co-workers and the failure of the company to address it.

In the first case in the 8th U.S. Circuit to recognize a claim for retaliatory harassment by a co-worker, Kpou v. Supervalu, U.S. District Court Judge Joan Ericksen denied the defendant summary judgment on three claims of discrimination.

The case was brought under 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, and the Minnesota Human Rights Act. Plaintiff bases claims on Supervalu's hostile work environment perpetuated by co-workers. Plaintiff also alleges that Supervalu negligently retained and supervised several of the co-workers in violation of Minnesota common law.

(A second plaintiff was dismissed from the case.)

17 discrete incidents

Kpou's claim is based on events at the distribution center, where he has worked since 2002. His complaint lists 17 discrete incidents, in addition to general, ongoing harassment. It started with an argument in the break room where one of the white employees threw a bottle of hot sauce at Black employees. Later that day an employee named Larry Schmitz drove his 9,000-pound forklift into the plaintiff, who was operating a 4,000-pound pallet jack. That employee was terminated and committed suicide about a year later. Kpou was blamed and hostilities increased after Schmitz died.

Kpou was subjected to threatening notes including the N-word and other continuing aggression. He told Supervalu he was facing a hostile work environment as well as threats on his life and job in retaliation for Schmitz's termination.

“The harassment at issue is beyond the pale,” said attorney David Schlesinger. “We’re talking about death threats and physical violence.”

Supervalu’s reaction to the situation, including a Respectful Workplace training, was ineffective and incidents continued at least until Ericksen’s August 24 order.

McDonnell Douglas

Establishing a prima facie case of discrimination is the first step in a McDonnell Douglas burden-shifting analysis. The plaintiff must show that harassment is based on a protected status to establish a causal nexus between harassment and discrimination. If the plaintiff does that, the burden shifts to the defendant to produce a legitimate reason for its actions, and if the defendant does, the burden shifts back to the plaintiff to prove that the defendant’s evidence is pretextual.

The court found that a reasonable juror could conclude that the incidents involving Kpou were connected to his race or national origin. Although Supervalu contends that resentment over Schmitz’s termination was the reason for the incidents, a reasonable juror could find the termination itself was a result of discriminatory animus, Ericksen wrote.

The court also concluded that the harassment affected a term, condition or privilege of employment. The judge cited the 2005 U.S. Supreme Court case of Burlington N. & Santa Fe Ry. v. White for the proposition that a work environment is shaped by the accumulation of abusive conduct.

“The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed,” the Supreme Court said in Burlington.

Ericksen found the “constellation” could support a finding that the harassment was objectively hostile. She also said that a jury could find that the harassment was severe, particularly in light of the threatening nature of many of the incidents and the fact that many employees carried weapons.

Remedial action

The court rejected Supervalu's argument that it took appropriate action to address Kpou's complaints. Factors that a court may consider include the amount of time between notice of the harassment and any remedial action, the options available to the employer such as employee training sessions and disciplinary action taken against the harassers, and whether or not the measures ended the harassment.

The last factor was the problem for Supervalu. Remedial action must be reasonably calculated to end the harassment and necessarily entails adjustments in the light of new information, the court said. "An employer who realizes its initial response was ineffective and fails to take further action has not reasonably calculated a response to end the harassment. If an employer receives information that the remedial action it took was ineffective, the employer should recalculate its response," Ericksen said.

The judge also found it noteworthy that Supervalu didn't make any sort of statement condemning some of the more widely known incidents.

Thus the question of whether Supervalu took proper remedial action is a question best left to the finder of fact, the judge wrote.

Ericksen also said that a retaliatory harassment claim is not limited to a supervisor's harassment but depends on whether the employer's action or inaction would have dissuaded a reasonable worker from making or supporting a charge of discrimination.

The court further noted that in Burlington Northern, the Supreme Court recognized that retaliation claims provided broader protections than discrimination claims, and that the 8th Circuit subsequently recognized that retaliation claims could be based on hostile work environments.

The court also upheld a claim of negligent supervision as it relates to one employee that Supervalu knew or should have known may engage in injurious conduct. His harassment was noted in the police report related to the Schmitz forklift incident, and he was tangentially involved in that, Ericksen said.

Step forward

The case is a big step forward for plaintiffs, said attorney David Schlesinger. Until now, no court in the 8th Circuit has allowed a retaliatory harassment by co-worker claim, and Supervalu argued that such a claim did not exist.

But Ericksen held a reasonable jury could conclude that the harassment kept happening and Supervalu didn't do anything, Schlesinger said. "There are a lot of things they could have done if they wanted to take this seriously," he said. "We're going to show they didn't."

It appears that a split in the circuits is developing over co-worker harassment claims in the wake of Burlington, he said.

The ruling is also noteworthy for essentially saying that if efforts aren't working, they aren't reasonable, said attorney Laura Farley. "We think this is the heart of the case," Schlesinger said.

The attorney for Supervalu said he was not authorized by the company to comment.

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