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4th Circuit applies private sector standard to federal workers

■ Nick Hurston

THE 4TH U.S. CIRCUIT COURT OF APPEALS has applied the private sector "materially adverse" standard for retaliatory conduct to reverse the dismissal of a federal employee's race-based retaliation and harassment claims under Title VII.

The court held that Title VII's federal sector provision incorporated its private sector anti-retaliation provision.

"Our examination of Title VII's text [and relevant case law] compels us to hold that the ... 'materially adverse' standard applies to private employees and federal employees alike. That conclusion is in line with the majority view of the other circuits to address the question," Chief Judge Roger L. Gregory wrote.

Judges Robert B. King and Pamela A. Harris joined Gregory's opinion in Laurent-Workman v. Wormuth (VLW 022-2-250).

ONGOING INSULTS

Marie Laurent-Workman, an African American woman, began working for the U.S. Army as a civilian in November 2017 at a base in Belgium. Soon one of her co-workers, a white Dutch woman named Dorothea Adams, started harassing her.

Laurent-Workman claimed that Adams often said "Blacks cannot speak properly," complained that she couldn't understand them and referred to Black soldiers as "these people."

Their supervisor, Jasser Khalifeh, a white man of Jordanian descent, favored Adams and refused to address Laurent-Workman's harassment complaints, per the opinion.

In July 2018, Adams angrily said NATO did "things differently than 'you people,'" and hurled insults while following Laurent-Workman as she fled to her office.

During a meeting with another supervisor, Laurent-Workman was asked if she liked her job in a way that she believed was intended to dissuade her from further complaints. Laurent-Workman also heard Khalifeh tell colleagues in September 2018 that Black male athletes excelled in sports because "the slave masters had bred the strongest slaves together."

In a meeting about the harassment in November 2018, Adams allegedly mocked and screamed at Laurent-Workman before violently storming out of the room.

Laurent-Workman eventually filed a Title VII discrimination complaint with the EEOC, but apparently that only made the harassment more oppressive. She decided to apply for a job in another department. An inadvertently forwarded email between one of the selection directors and Khalifeh revealed that the two had mockingly discussed her application.

She didn't get the job, and the harassment continued until she resigned in August 2020.

Laurent-Workman sued the Army, alleging that she experienced a hostile work environment due to race-based harassment and retaliation by her supervisors through both discrete acts and a hostile work environment.

A U.S. District Court construed Laurent-Workman's failure to be selected for the job she applied for as the sole basis for her retaliation claims and granted the Army's motion to dismiss.

The court also dismissed her hostile work environment claims because the length of time between Laurent-Workman's Title VII complaint and her non-selection didn't permit an inference of causation, and because she didn't plead objectively severe or pervasive conduct.

Laurent-Workman appealed.

'HATEFUL WORKPLACE ENCOUNTERS'

First, Gregory rejected the lower court's conclusion that Laurent-Workman's allegations were too sporadic and not severe enough or related to her protected characteristics.

"Even though they do not depict daily misconduct, Laurent-Workman's allegations demonstrate a series of hateful workplace encounters

that consistently targeted her racial identity," the judge wrote.

Finding that the conduct was "neither isolated nor a symptom of trite differences," Gregory said "Laurent-Workman's allegations describe just the sort of workplace behaviors that Title VII serves to root out — repeated invectives of an overtly racial tenor."

'A MULTI-ACT STORY'

Title VII forbids employment discrimination based on race, color, religion, sex or national origin, and extends that protection to federal employees through a federal sector provision that provides: "All personnel actions affecting employees or applicants for employment ... in executive agencies ... shall be made free from any discrimination based on race, color, religion, sex, or national origin."

In 2006, the U.S. Supreme Court held in Burlington Northern & Santa Fe Railway Company that Title VII retaliation required "materially adverse" conduct that would dissuade a reasonable worker from reporting complaints.

The Army argued that Burlington Northern only applied to private sector claims of discrete act retaliation. But Gregory cited an unpublished Fourth Circuit opinion which held that Burlington Northern controlled both federal and private sector employee claims.

That opinion also said the federal sector provision's regulation of "all personnel actions" includes a broad range of activity.

Based on that holding, the Fourth Circuit panel concluded that "the federal-sector provision incorporates by reference the anti-retaliation provision [and] adopts the standard applicable to the anti-retaliation provision."

Noting Laurent-Workman's several accusations of harassment, Gregory wrote that while "any one of these allegations does not amount to much when considered in isolation, '[t]hese determinations depend on the totality of the circumstances, as [a] play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.' Together, the allegations tell a multi-act story of undermining, gaslighting, and disruption. She has adequately pled that a reasonable employee may have been dissuaded from following through with her complaints due to Khalifeh's conduct."

CAUSATION

However, the court rejected Laurent-Workman's discrete act retaliation claim, saying she "failed to allege a non-speculative link between her Title VII claim and her non-selection" for the job she applied for, given the two-month gap between the events.

"Causation can be shown in two ways: by 'show[ing] that the adverse act bears sufficient temporal proximity to the protected activity,' or by showing 'the existence of facts that suggest that the adverse action occurred because of the protected activity,' or a combination of the two," Gregory wrote. "Laurent-Workman's allegations support neither showing."

'FURTHER GUIDANCE' FOR COURTS

Annapolis attorney Ruth Ann Azeredo, who represented Laurent-Workman, said the 4th Circuit's decision allows her client to move forward with her hostile work environment claims against the Army in the Eastern District of Virginia. While they didn't succeed in having all claims revived, she is heartened by the court's ruling.

"The decision emphasized the purpose of Title VII and the wrongful conduct it was designed to address," she noted. "By doing this, it is a reminder that the underlying policy and purpose of Title VII should guide the analysis. The defendant had argued that federal employees, including the plaintiff, have less protection than other employees under Title VII in both substantive claims of discrimination and retaliation claims."

Azeredo said her arguments included that federal employees had the same protections under Title VII as any other employee, and that the standard for a hostile work environment claim based on retaliation was conduct that, in the aggregate, dissuaded an employee from bringing complaints, which is a lower threshold to meet.

"In its opinion, the 4th Circuit Court of Appeals the court aligned with our position and emphasized that negative racial comments, gaslighting, and acts of sabotage against an employee by a supervisor and co-worker, can, in the aggregate, amount to a hostile work environment," she pointed out. "The decision provides further guidance to courts below as to pleading requirements at the motion to dismiss stage in hostile work environment claims."