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Developments

UNITED STATES SUPREME COURT CONTINUES TO RESTRICT "SINGLE INCIDENT" SEXUAL HARASSMENT CLAIMS AND RELATED RETALIATION CLAIMS (April 24, 2001)

Summary

For years, our nation's Supreme Court was silent on the issue of sexual harassment. However, in the last three years, the Court has issued several decisions in this area. The most recent decision, issued April 23, 2001, continues the Court's recent trend reigning in the definition of what constitutes actionable sexual harassment and sets forth some helpful rules regarding the evidentiary requirements for an actionable retaliation claim. *Clark County School District v. Breeden* (April 23, 2001).

The Case

The plaintiff, Shirley Breeden, was employed by the Clark County School District. During a meeting with a male supervisor and another male employee to review the psychological evaluation reports of four job applicants, the group read that one applicant disclosed that he once told a co-worker, "I hear making love to you is like making love to the Grand Canyon." The men chuckled at this comment. Breeden complained about this incident, and later complained that her employer retaliated against her for making the complaint. She then filed a discrimination claim with the EEOC, after which she was transferred to a new position. She eventually sued in federal court, asserting that her employer retaliated against her for her internal complaint and for her EEOC charge.

Although the employer prevailed at the trial court level, the Ninth Circuit Court of Appeals reversed that decision and reinstated the employee's claim. However, in an unsigned *per curiam* decision, the United States Supreme reversed the Ninth Circuit, and upheld the trial court's judgment in favor of the employer.

Relying heavily on its trio of 1998 sexual harassment decisions, the Supreme Court ruled that "No reasonable person could have believed that the single incident . . . violated Title VII. . . ." The Court reaffirmed that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."

The most interesting aspect of the Court's decision, however, was its ruling that the employee could not maintain a retaliation claim based on either her internal complaint or the filing of an EEOC charge. As to the internal complaint, the Court ruled that in light of the requirement that conduct be "extremely serious" to constitute sexual harassment, it was not possible for her to have a "reasonable, good faith belief" that the incident violated Title VII and therefore this part of her retaliation claim failed.

With respect to the filing of the EEOC charge, the Court relied heavily on the fact that the employer presented evidence that it was contemplating transferring the employee before she filed with the EEOC. The Court stated, "Employers need not suspend previously planned transfers upon discovering

that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality."

The Court also refused to rely solely on the timing of the transfer as evidence of a connection between the transfer and the EEOC charge. It underscored that when mere timing is the only evidence of retaliation, the proximity of the protected activity and the adverse employment action must be "very close," citing with approval cases holding that a three or four month period is insufficient.

What This Means

The Court has made it very clear that conduct will only constitute sexual harassment if it is "very serious," and that under this standard, simple teasing, offhand comments, and isolated incidents are insufficient to support a claim of harassment.

But the decision offers employers the most help in the area of retaliation, which has traditionally been a very difficult issue. By throwing out the employee's retaliation claim on the basis that the employee could not have had a "reasonable, good faith belief" that the single incident violated Title VII, the Court has provided an excellent tool which should extricate employees from baseless retaliation claims. Similarly, the Court's favorable statement that a period of three months between a complaint and an adverse action is insufficient to support a retaliation claim will also be helpful to employers in many retaliation lawsuits. Finally, the Court's reliance on the fact that the employer was previously contemplating a transfer highlights the importance of creating and retaining evidence of proposed transfers, disciplinary action or other perceived "adverse actions," to show not only when and why the decision was made, but when it was first being contemplated.

If you have any questions about this or wish to learn about Paul Plevin & Sullivan's sexual harassment training programs, please contact Fred Plevin (fplevin@paulplevin.com) or at (619) 744-3650 at Paul Plevin & Sullivan.

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