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EMPLOYMENT LAW

Contested Harassing Statements Leads to Denial of Summary Judgment

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Special to the Legal

"He said, she said" is one of the clearest paths to trial for a plaintiff claiming workplace harassment or discrimination. This is particularly so when the statements in question are explosive. A clear example of this conundrum for employers was addressed in the recent decision of *El v. Advance Stores,* No. 17-2345, 2017 U.S. Dist. LEXIS 211887 (E.D. Pa. Dec. 27, 2017).

PLAINTIFF PROMOTED TO STORE MANAGER

Tahara El, an African-American woman, worked for Advance Auto Parts from 2002 until her termination in early 2016, according to the opinion. She was promoted to general manager of Advance's Upper Darby store in 2008. For what appears to be the next few years, El endured both gender and racial harassment from her then-supervisor, before he was ultimately terminated for harassing another employee. These allegations provide only a backdrop to the claims at issue in El's lawsuit.

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MANAGER AS ALLEGED HARASSER

In late 2014, Chris McErlane, Advance's district manager, began supervising El. El testified that as soon as McErlane took over, he "started giving her a hard time." Specifically, El alleged that McErlane would respond to workplace requests by telling her that they don't matter because "she would not be with Advance long." She further claimed that McErlane would talk down to her, curse her, state that "women should not be in superior positions like management" and that she did not deserve her salary. One of the employees in the Upper Darby store claimed to have heard McErlane state that "I am dealing with a lot of, you know, apes." A few months later, McErlane allegedly told El that the employees in her store were "acting like a park of apes" and referred to African-American woman by a derogatory racial and sexist term. Again, McErlane denied these statements.

Further, when El needed leave to take care of her son following brain surgery, McErlane is alleged to have asked her whether it was "worth staying out those couple of days" and, while he granted any requested leave, "she had to hear the wrath of it." El claimed that McErlane's comments made her scared to ask for additional leave because she "knew he was gunning for her."

NON-APOLOGY AFTER INVESTIGATION

When El complained about McErlane's treatment to his supervisor, human resources and the company's ethics hotline, McErlane allegedly berated

her and forced her to work on a scheduled day off. Perhaps more importantly, Advance denied El's request to transfer and demanded only that McErlane apologize to El. Rather than do so, however, McErlane told El "I am not here to apologize, but it was told to me to come and apologize. … I still don't think you deserve this job." Shortly after this "nonapology," McErlane allegedly sent El a text threatening violence against African-American women. McErlane, however, denied having done so.

TERMINATION FOR AGED PURCHASE

In early 2016, Advance's asset production manager, Paul Kofmehl investigated the circumstances of El's purchase of company products in March 2015, 11 months earlier. At the conclusion of the investigation, Kofmehl appeared to exonerate El when he told McErlane to "leave El alone" and she returned to work. A few weeks later, after El took a leave of absence for stress (caused by McErlane's treatment), she was terminated for the purchase Kofmehl had previously investigated. El subsequently brought suit claiming gender discrimination, retaliation and harassment as well as racial and disability discrimination. After the close of discovery, Advance moved for summary judgment.

Initially, the court denied summary judgment to Advance on El's claim of gender and race discrimination. The court found that because there was evidence that a male employee had purchased products under similar circumstances and was not terminated, El had stated a prima facie case and, because Kofmehl, the asset production manager, had initially indicated that McErlane should "leave El alone," there was a legitimate question as to whether she should have been terminated for the purchase. Because all of the alleged comparators were also African-American, the court found McErlane's alleged racial comments (which, again, he largely denied) to establish the necessary causal connection between her race and termination. These statements, in combination with, again, Kofmehl's initial direction to "leave El alone," was sufficient to defeat summary judgment on El's race discrimination claim.

Allegations of harassing statements will almost always be problematic from an employer's perspective.

The court also denied summary judgment on El's claims of race and gender harassment, finding that McErlane's alleged racial and sexist comments were sufficient to establish the claims. Notably, the court found that a reasonable person would have been affected by McErlane's comments, particularly if they occurred (as alleged) after she reported the harassment to both human resources and a supervisor.

The court next considered El's claim of retaliation based largely upon her complaints in summer 2015, which the court found could have led to her termination in February 2016. While the court acknowledged that the period between the complaint and termination lessened the ability to establish causal connection based upon "temporal proximity," "the circumstances and inconsistency surrounding [El's] termination suggest McErlane acted with retaliatory animus."

QUESTION RE: CAUSAL CONNECTION

It should be noted that, with respect to the retaliation claim, while there are apparent inconsistencies regarding El's termination, such inconsistencies would generally go to the issue of pretext rather than establish a "causal connection." Using such inconsistencies for both causal connection and pretext seems to blur, if not erase, the distinction between the two.

The court did grant summary judgment on her disability discrimination claim finding that in this circumstance, there was no causal connection between her medical leaves and the termination decision.

As noted, allegations of harassing statements will almost always be problematic from an employer's perspective. In this case, however, the employer's response to the alleged harassment appeared to be thin and there appears to have been no follow-up on whether McErlane had even done the minimum and apologized. Moreover, while it is usually an anathema to employers, once El complained of discrimination, the termination decision needed to be given an extra level of vetting from the beginning. For Advance to seemingly flip-flop on the appropriate discipline (particularly for an 11-month-old infraction) would, almost by definition, create an issue of fact for trial. •