A Brief Sampling of Eighth Circuit Decisions Under Title VII Leading Up to the #Me Too Movement

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Introduction

Title VII[1] is the main Federal law that bars harassment based on sex, race, national origin, and other protected characteristics as well as other forms of discrimination in the workplace. In fact, the concept of illegal harassment first developed under Title VII. Therefore, the rulings under that statute have played a central role in setting the standard for what workplace conduct is actionable.

Unfortunately, Federal courts have increasingly embraced case analysis that permits an array of unacceptable conduct in the workplace to go unaddressed – at least through litigation. Rulings by the Eighth Circuit Court of Appeals in the months leading up to the emergence of the #Me Too Movement, a grassroots response to egregious harassment and other abuses by powerful figures around the country, exemplify the ongoing and problematic approach to harassment and related claims prosecuted under Title VII.

I. The Eighth Circuit's Longstanding Tendency to Preclude Employer Liability for Serious Harassment in the Workplace

The Eighth Circuit has repeatedly treated harassment and other discrimination claims with great skepticism, often not even allowing the plaintiffs to present their case to a jury for decision. In *Duncan v. Cnty of Dakota, Neb.*, for example, the Eighth Circuit reversed the denial of summary judgment for the employer by finding that no harassment occurred when the supervisor touched and sexually propositioned the plaintiff – including offering benefits in exchange for the plaintiff performing sex acts – because the conduct was simply "vile and inappropriate."[2] Similarly, in *EEOC v. CRST Van Expedited, Inc.*, the Eighth Circuit upheld summary judgment for the employer by finding no harassment occurred when the supervisors of female long-haul trucking trainees boasted about the supervisors' past sexual exploits, made other sexually vulgar comments, and propositioned the female trainees for sex during extended overnight trucking trips because such behavior was "[m]erely rude or unpleasant conduct" or involved "mere offensive utterance[s]."[3] The Eighth Circuit has taken this highly tolerant approach, to put it mildly, in general – not only in sex harassment cases. In *Willis v. Henderson*, for example, the Eighth Circuit affirmed summary judgment for the employer by finding no harassment occurred when white co-workers bragged to the African-American plaintiff about being Ku Klux Klan and militia members who "get things done" and who apparently put threatening racist material in the plaintiff's work area.[4]

II. Recent Eighth Circuit Rulings Largely Continue the Unfortunate Trend in Title VII Cases

The decisions made by the Eighth Circuit in the months leading up to the rise of the #Me Too Movement track the opinions typically issued by the Eighth Circuit in recent years. In other words, the rulings have been decidedly pro-employer in harassment and other discrimination cases – as reflected by the decisions summarized below.

Abdel-Ghani v. Target Corp., 686 Fed. App'x 377 (8th Cir. 2017), cert. denied 138 S. Ct. 362 (2017)

Plaintiff, a Pakistani employee, asserted national origin harassment under Title VII (and the Minnesota Human Rights Act).[5] The harassment involved the plaintiff's direct supervisor telling the plaintiff to "go back home, go to your country" and other co-workers calling the plaintiff names like "camel jockey, Muslim, Arab, terrorist, and sand nigger, often from behind shelves in the employee backroom" at least 10 times during his two months working for the employer.[6] The Eighth Circuit affirmed summary judgment for the employer for the following reasons: (1) because although the facts alleged "may have been 'morally repulsive,' they were not physically threatening" and did not interfere with the plaintiff's work performance and (2) the statement by the plaintiff's manager that the plaintiff should "go back home, go to your country" was "facially neutral as to national origin" and, thus, did not "demonstrate animus on [her] part."[7]

Jackson v. Norac, Inc., 685 Fed. App'x 510 (8th Cir. 2017)

The plaintiff sued the employer under VII (and State law) for sex harassment.[8] In a per curiam opinion, the Eighth Circuit upheld summary judgment for the employer based on the following conclusions: (1) the plaintiff did not endure actionable sex harassment when a co-worker gave her a penis ring and asked if she knew what it was and separately showed the a naked picture of himself to the plaintiff because the plaintiff did not report the conduct or, if she did, the employer "took care of it" and (2) the plaintiff did not endure actionable race harassment because the various forms of hostility were "not constant" and "none was physically threatening or humiliating; and they don't appear to have unreasonably interfered with [the plaintiff's] work."[9]

Edwards v. Hiland Roberts Dairy, Co., 860 F.3d 1121 (8th Cir. 2017)

Although outside the harassment context, this case further illustrates the ongoing trend in Eighth Circuit cases. The plaintiffs, two African-American employees terminated for alleged "time theft," pursued race discrimination claims under Title VII (and State law).[10] The Eighth Circuit affirmed summary judgment for the employer despite comparator evidence evidently reflecting disparate treatment, the employer's failure to follow its own policies, and the employer's changing rationales for why it fired the plaintiffs. The Eighth Circuit justified its decision as follows: (1) the two white employees not terminated for "time theft" were not similarly situated to the plaintiffs because – despite having the same supervisors and being subject to the same employment standards – the white employees supposedly did not engage in dishonest conduct; (2) the employer's failure to follow its policies during investigation did not matter because the plaintiffs failed to prove the employer's investigation was incomplete – declaring that "a shortcoming in an internal investigation alone, without additional evidence of pretext, would not suffice to support an inference of discrimination on the part of the employer;" and (3) the supervisor's shifting reasons for firing the plaintiffs were not "substantially different."[11]

III. Glimmers of Hope Even Before the #Me Too Movement?

It has not been all gloom and doom for plaintiffs in employment and civil rights cases before the Eighth Circuit. The decision outlined below illustrates this fact, at least concerning retaliation claims. In that regard, the United States Supreme Court has repeatedly taken an extraordinarily pro-plaintiff approach.[12]

Donathan v. Oakley Grain, Inc., 861 F.3d 735, *rhrg. and rhrg. en banc denied* (8th Cir. 2017)

The plaintiff, who the employer terminated after complaining about the lack of bonuses, brought suit against the employer for alleged retaliation in violation of Title VII (and related employment statutes).[13] The Eighth Circuit reversed summary judgment for the employer because the Eighth Circuit acknowledged that a material fact dispute existed.[14] The Eighth Circuit reasoned that that the plaintiff's letter complaining of unequal pay based on her sex was protected activity and that she suffered an adverse employment action by being terminated.[15] The Eighth Circuit also found that the plaintiff met her **prima facie** burden regarding

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causation because the termination occurred shortly after she complained about discrimination and despite the absence of negative reviews.[16] The Eighth Circuit ultimately explained its rare reversal of summary judgment for the employer as follows: "[t]emporal proximity, therefore, is more meaningful in a case such as the present one where it is impossible to infer timing issues arise from an employee's calculated or strategic engagement in protected conduct."[17]

Conclusion

The Eighth Circuit continues to be an exceedingly difficult forum for plaintiffs who prosecute harassment and other discrimination claims. As the awareness about the true nature and scope of the problems with harassment and other discrimination in the workplace increases, thanks to the #Me Too Movement and other recent developments, hopefully the courts will respond appropriately going forward.

[1]42 U.S.C. §§ 2000e, *et seq.*

[2]687 F.3d 955, 960 (8th Cir. 2012).

[3]679 F.3d 657, 687, *rhrg. and rhrg. en banc denied* (8th Cir. 2012) (citing Supreme Court and Eighth Circuit precedent).

[4]262 F.3d 801, 804-05, 808-09 (8th Cir. 2001).

[5]686 Fed. App'x 377, 378 (8th Cir. 2017), *cert. denied* 138 S. Ct. 362 (2017).

[6]*Id.*

[7]*Id.* at 379-80.

[8]685 Fed. App'x 510, *1 (8th Cir. 2017).

[9]*Id.*

[10]860 F.3d 1121, 1124-25 (8th Cir. 2017).

[11]*Id.* at 1125-27.

[12]*Dep't of Homeland Security v. MacLean*, 135 S.Ct. 913, 920-24 (2015) (in an opinion authored by Chief Justice John Roberts, ruling that the whistleblowing at issue was protected activity even though it violated a federal regulation); *Kasten v. Saint-Gobain Perform. Plastics Corp.*, 563 U.S. 1, 4-5 (2011) (holding that the anti-retaliation provision of the Fair Labor Standards Act protects employees who only make an oral complaint, rejecting the trend under state law that increasingly requires formal and/or written reports to compel protection); *Thompson v. North Amer. Stainless, LP*, 562 U.S. 170, 173-75 (2011) (in a unanimous opinion announced by Justice Antonin Scalia, concluding that adverse action against a third party can support a retaliation claim); *Crawford v. Metropolitan Government of Nashville*, 555 U.S. 271, 273-74 (2009) (ruling that Title VII's anti-retaliation provision protects employees from retaliation when employees merely participate in an employer's internal investigation of a potential violation); *Gomez-Perez v. Potter*, 553 U.S. 474, 478-79 (2008) (in an opinion authored by Justice Samuel Alito, basically reading an anti-retaliation provision into the Age Discrimination in Employment Act); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445 (2008) (holding that Section 1981 protects individuals who have complained about potential violations concerning a third party); *Burlington North and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (ruling that what constitutes adverse action in support of a retaliation claim is anything which "might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'").

[13]861 F.3d 735, 737-38, *rhrg. and rhrg. en banc denied* (8th Cir. 2017).

[14]*Id.* at 737, 743.

[15]*Id.* at 740.

[16]*Id.* at 741-43.

[17]*Id.* at 743.