The “Knife’s Edge”: Second Circuit Dulls the Standard of Proof Needed for a Hostile Work Environment

Barbara E. Hoey

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The Second Circuit recently reversed a district court’s dismissal of a hostile work environment claim brought by a Muslim plaintiff. *See Ahmed v. Astoria Bank, et al.*, 16-1389 (2d Cir. May 9, 2017). In-house counsel and human resources executives should take heed of this decision, which may signal a loosening standard for what may constitute a hostile work environment. As we all know, once a plaintiff gets past summary judgment, the settlement value of a case will increase drastically. As we will talk about below, it becomes even more important to be proactive and prevent these claims.

The Facts

The plaintiff, Sherin Ahmed, was an Egyptian and Muslim, and wore a hijab head covering. She only worked for Astoria Bank for three months, but claimed that managers subjected her to a “hostile work environment” by: (1) on the day of Ms. Ahmed’s interview (coincidently September 11, 2013), a vice president made comments insinuating that people of Arab or Middle Eastern ethnicity were “terrorists”; (2) on several occasions, the same employee made jokes regarding Ms. Ahmed’s hijab head covering; (3) Ms. Ahmed’s supervisor “singled her out” on the days she arrived late for work; (4) the supervisor would also speak slowly and use hand gestures to communicate with Ms. Ahmed, which she inferred as the supervisor not believing Ms. Ahmed spoke English; (5) the direct supervisor denied Ms. Ahmed’s request to be relieved without pay for a few hours on a major Muslim holiday, despite two other Muslim employees supervised by other managers being given the day off; (6) the direct supervisor made an allegedly “condescending” and “judgmental” comment about Arabic women wearing a head covering; (7) the supervisor also made a comment regarding terrorists; (8) the supervisor refused to allow Ms. Ahmed to take chocolate from the supervisor’s office, despite allowing other employees to do so; and (9) the supervisor reprimanded Ms. Ahmed for leaving early during inclement weather, despite Ms. Ahmed having permission to do so.

The District Court’s Decision

The district judge explained that Ms. Ahmed had a “weak case.” Despite this view, the judge stated he was “right on the knife’s edge” of either dismissing the case or allowing it to go to a jury. Ultimately, the judge dismissed the hostile work environment claim since Ms. Ahmed could only point to a few incidents over the course of her three-month employment period in support of her claim. The district judge held this did not show there was a “steady barrage of opprobrious racial comments” to support a hostile work environment claim.

The Second Circuit’s Reversal

The Second Circuit took a different view from the district court and found that the knife's edge favored Ms. Ahmed. The Second Circuit was persuaded by the claims that the vice president "constantly" told Ms. Ahmed to remove her hijab, that he referred to the hijab as a "rag" and had demeaned Ms. Ahmed's race, ethnicity, and religion. They also credited her claim that the vice president made a derogatory comment towards Ms. Ahmed during her interview (that occurred on September 11, 2013) referencing "terrorism." The Court held that this evidence, together with the comments and conduct of Ms. Ahmed's supervisor, was enough to allow the case to proceed to a jury since it may show a hostile work environment.

Employer Takeaways

This decision should serve to remind employers of the important lesson that there is no bright line rule as to what constitutes a hostile work environment, and even a few comments over a short period can be enough to support a claim. Judges are forced to finely parse evidence and compare it to an ever-changing body of case law. When a judge has to engage in these fact-specific inquiries, they are more likely to allow the case to go to trial for a jury to sort out the evidence. Once the case is in the hands of a jury, all bets are off.

The first and best solution is prevention so that these incidents don't happen. You need:

- **Clear** and **simple** policies, which are displayed and posted in multiple venues in the workplace;
- The next thing you need is training. You cannot do enough training of **all** managers and any employee who does interviews. They must understand that any "joke" or "innocent" comment can be misunderstood. Second, train them to warn colleagues when a conversation is going astray;
- Finally, you need a **clear** and **simple** complaint procedure, giving employees multiple avenues to complain, and you need to respond to complaints, promptly investigate and take **real action** to remediate the allegations.

Employers who are not proactive to ensure these incidents don't happen in the first place may find themselves facing a lawsuit where, as this case shows, the outcome is entirely unpredictable.