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EMPLOYMENT LAW

Physical Assault of Harasser Doesn't Bar Retaliation Claim

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Special to the Legal

In addressing a matter of first impression in this circuit, the U.S. District Court for the Eastern District of Pennsylvania held in *Speed v. WES Health System*, No. 14-0286, 2015 U.S. Dist. LEXIS 23818 (E.D. Pa. Feb. 26, 2015), that an employee does not "forfeit her retaliation rights under [Title VII of the Civil Rights Act of 1964] for physically defending herself against a sexual advance after an employer fails to take corrective measures about a hostile work environment."

AN EMPLOYEE IS SEXUALLY HARASSED

Shameka Speed was hired by WES Health System as a behavioral health worker in February 2012. As part of her job duties, she was required to work in close physical proximity to Macon Garway, WES's clinical coordinator. According to her second amended complaint, in May 2012, Garway began to sexually harass Speed by "making sexually suggestive and lewd comments, gestures, and innuendoes toward" her. "The harassment [Speed] allegedly suffered was overtly sexual, anatomically specific, and crude," the opinion said. Almost on a daily basis, Garway made sexual remarks to Speed and suggested to her that the two engage in sexual relations. Sometimes, Garway made explicit sexual reference to Speed's body parts and would point to Speed's private areas or his own private parts and make sexually explicit remarks toward Speed. Speed alleged that "she never encouraged this behavior in any way, but instead communicated to Garway that she found his conduct repugnant and offensive," the opinion said.

By November 2012, the alleged sexually harassing behavior escalated and became more repugnant and more frequent. Speed apparently complained orally and in writing to her supervisor, Cornelius Edwards, in late 2012. Other female employees also complained to WES apparently about Garway's offensive and inappropriate remarks. After Speed complained to WES, WES did not discharge "Garway, separate him from working with Speed, or otherwise supervise him," the opinion said. Rather, Speed was required to continue working closely with Garway. As outlined in Speed's complaint, WES took no action in response to Speed's complaints of sexual harassment.

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SPEED HAS ENOUGH AND FIGHTS BACK AGAINST GARWAY

In April 2013, Garway's conduct escalated further. He began touching and rubbing Speed and would intentionally walk close to Speed and rub his body against hers. At this time, Speed claims that she feared "imminent bodily harm whenever Garway made sexually suggestive remarks or

approached her," the opinion said. On April 12, 2013, Garway rubbed his hands on Speed's legs. In response, Speed warned Garway that if he touched her again, she would defend herself. Apparently, Garway took this threat as a "dare" and "deliberately and intentionally reached out to touch [Speed] at which time ... Speed struck Garway on the side of his face and he ceased his effort to touch her," the opinion said.

Following the April 12, 2013, incident, Speed complained to Edwards again and in response, Edwards informed Speed that if he had to write Garway up, he would also have to write Speed up. WES apparently did investigate Speed's complaints and determined that Garway did in fact sexually harass Speed and Garway was terminated April 25, 2013. However, WES also determined during its investigation that Speed physically assaulted Garway and also terminated her employment April 25, 2013, for "physically assaulting a coworker," the opinion said.

Speed filed suit against WES alleging sexual harassment, a hostile work environment, and retaliation in violation of Title VII and the Pennsylvania Human Relations Act. WES moved to dismiss Speed's retaliation claims, arguing that its discharge of Speed was inherently lawful because she admitted to striking Garway.

ASSAULTING HARASSER DOESN'T BAR RETALIATION CLAIM

The court found Speed's claims to be viable. The court found that Speed had sufficiently alleged a prima facie claim for retaliation; however, WES attempted to argue that Speed's physical assault of Garway and her alleged admission in the complaint of physically assaulting Garway forecloses her ability to argue that WES's stated reason for her termination was pretextual.

WES moved to dismiss Speed's retaliation claims, arguing that its discharge of Speed was inherently lawful because she admitted to striking Garway.

The court ultimately rejected WES's argument, citing decisions from the Eighth and Ninth circuits, which ultimately found that "when an employee is fired because he acted to defend himself against harassment, which supervisors failed to take reasonable measures to prevent or correct, the termination process cannot be said to be free from discrimination" and "reasonable self-defense may be considered protected oppositional activity for purposes of a Title VII retaliation claim," respectfully. The court also relied on a decision from the U.S. District Court for the Southern District of Iowa in *Van Horn v. Specialized Support Services*, 241 F. Supp. 2d 994 (S.D. Iowa 2003), which found that, while an employer is free to maintain a "zero-tolerance" policy for workplace violence, Title VII does not "allow an employer to ignore clear warning signs and then terminate an employee who resists sexual harassment and assault at the workplace."

In the present case, because Speed did not allege that her assault of Garway constituted "protected activity" under Title VII, the court did not opine on that issue. The court did note that it had "no hesitation, however, in rejecting [WES's] position that [Speed's] conduct here bars her retaliation claim."

The case highlights that at the motion to dismiss stage, dismissal of retaliation claims is difficult. This case also serves as an indication that, while the court did not specifically reach the issue of whether employees who are forced to defend themselves from perceived harassment have engaged in "protected activity," the Eastern District seems to be open to expanding Title VII retaliation claims to encompass this behavior. •