Labor & Employment Issues
In Focus

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"SINCERITY" IS "EXCEEDINGLY AMORPHOUS" SAYS SOUTHERN DISTRICT IN GRANTING PLAINTIFFS SUMMARY JUDGMENT FOR RELIGIOUS ACCOMMODATION

In a detailed decision dated September 5, 2023, U.S. District Court Judge Ronnie Abrams granted three of four Correction Officers ("CO") summary judgment against the New York State Department of Corrections and Community Supervision ("DOCCS") for failure to grant them a religious accommodation of their "sincere belief" to grow beards, thereby violating their First Amendment rights and Title VII of the Civil Rights Act of 1964 ("Title VII"). *Sughrim et al. v. State of New York et al*., No. 19-CV-7977 (RA) (SDA) (S.D.N.Y.). The decision makes clear that an employer challenging the sincerity of religious beliefs bears a very heavy burden.

CO's Glexner and Alshamiri were denied an accommodation for a 1-inch beard in accordance with their professed Muslim faith, while CO Sofo was denied that accommodation for his Norse Pagan faith. In all cases, the undisputed record demonstrated that "Defendants repeatedly denied requests for religious accommodation based on their independent determination that wearing a beard was not a requirement of a believer's faith," observed the Court. However, "well settled law ... makes clear that ... an inquiry into "the truth" of an individual's 'concepts' of their religious faith ... is foreclosed ..." Rather, "sincerity" is limited to whether the individual's profession of faith is pretextual, as where an employee acts in a manner inconsistent with his professed faith. Here, since DOCCS denied the accommodation based on its view of what Islam and Paganism required, and there existed no other record evidence contrary to Glexner, Alshamiri's and Sofo's sincerity, the Court ruled that these Plaintiffs were entitled to summary judgment.

CO Feliciano also passed the sincere belief prong for his Muslim faith, but did not thereby automatically win an accommodation. Feliciano requested a 4-inch beard. While there existed undisputed evidence that DOCCS sometimes allowed 1-inch beards, thereby refuting any defense of hardship for the three other COs, a question of fact existed as to whether DOCCS ever allowed a 4-inch beard and whether such length imposed an undue hardship on DOCCS because inmates could grab such a beard during a fight or a CO could smuggle contraband to inmates. Accordingly, the Court denied Feliciano's motion for summary judgment.

Judge Abrams' decision well illustrates that employers denying religious accommodations must tread carefully on religious interpretations, lightly on sincerity and heavily document any claim of undue hardship.

MASSACHUSETTS CANNABIS RETAILER ORDERED TO BARGAINING TABLE UNDER NEW *CEMEX* RULE

On August 31, 2023, In Focus reported on a decision issued by the National Labor Relations Board ("NLRB" or "Board") called *Cemex Construction Materials Pacific, LLC* (28-CA-230115) (August 25, 2023), which announced that when a union requests recognition with evidence that a majority of employees want the union, an employer must either promptly recognize and bargain with the union or file a petition with the Board seeking an election. An employer that fails to act on one of those two options could be faced with a bargaining order. An employer found to commit unfair labor practices while faced with a valid request for recognition loses the opportunity to have an election and must bargain with the union. On September 21, 2023, an Administrative Law Judge (ALJ) issued such a bargaining order under *Cemex* for the first time.

The union requested recognition in January 2022 by sending a letter signed by the majority of employees in I.N.S.A. Inc.'s Salem, Massachusetts store demanding that it recognize and bargain with the union. Four days later, the union petitioned with the Board for an election. In the time between when the union sent the letter and when it eventually lost the election, the company engaged in a laundry list of conduct which the union and the NLRB General Counsel categorized as either unlawful or objectionable:

> holding mandatory meetings to discourage employees from supporting the Union; soliciting employee grievances, and promising employees increased benefits and improved terms and conditions of employment if they refrained from supporting the Union; having its owners and high-level managers make unprecedented and repeated visits to the store, creating the impression of surveillance; threatening employees with various adverse consequences if the Union were to win the election; informing employees that they would not receive performance reviews and related wage increases until after the election; restricting employees from talking about unions while allowing employees to discuss other, non-work-related topics; discriminatorily enforcing work rules and policies, disciplining and discharging employees because they engaged in union activities; and implementing a wage increase for all employees following the election.

NLRB, ALJ Decision, *I.N.S.A., Inc*., No. CA-290558 (Sept. 21, 2023). The ALJ ultimately agreed that the company violated Sections 8(a)(1) and (3) of the National Labor Relations Act and ordered it to cease and desist certain practices and "take certain affirmative action to effectuate the policies of the Act," including reinstating terminated employees with back pay.

Notably, in light of the *Cemex* decision, the ALJ also found that the possibility for a fair rerun election was undermined by the employer's conduct and ordered I.N.S.A. to the bargaining table. The ALJ noted that the employer's conduct "clearly was intended to send a message" to the unit employees, thus necessitating a remedial bargaining order.

IN CLARIFYING RETALIATION STANDARD, SECOND CIRCUIT GROUNDS PLAINTIFF'S CLAIMS TO A HALT

Recently the United States Court of Appeals for the Second Circuit ("Court" or "Second Circuit") clarified the standard applied when determining Title VII retaliation claims. *Carr v. New York City Transit Authority et al.,* No. 22-792-CV (2d Cir. Aug. 7, 2023). Jennifer Carr ("Carr") was a former employee of the New York City Transit Authority ("NYCTA") who brought claims under the Age Discrimination in Employment Act ("ADEA"), Title VII of the Civil Rights Act of 1964 ("Title VII") and the Civil Rights Act of 1866 for age, race, and gender discrimination. Her claims were dismissed by the United States District Court for the Southern District of New York ("District Court" or "Lower Court"). She appealed and argued that the trial court applied the wrong standard to the retaliation claim and that it erroneously concluded that she failed to demonstrate the defendants' race-neutral reasons for not selecting her for two promotions were pretextual.

Carr, an "African-American female of Caribbean descent" born in 1955 worked for NYCTA from 2000 to 2022. In the time period relevant to her lawsuit, she had the title of Director of Telecommunications and Systems, Capital Programs. In 2013 and 2014, Carr applied for two senior director positions, but her supervisor, also an "African-American female of Caribbean descent," promoted two younger non-Black men for the roles. Both men had worked at NYCTA longer and had technical backgrounds, whereas Carr's degrees were in business and public administration. One of the men, David Chan, became Carr's supervisor. In September 2014, Carr filed a complaint with NYCTA's Equal Employment Opportunity Office ("EEO") and a charge with the U.S. Equal Employment Opportunity Commission ("EEOC") in May 2015. She received a right-to-sue letter from the EEOC and sued in December 2016. She alleged that after she reported discrimination in September 2014, her relationships with supervisors and her performance evaluations deteriorated. She alleged, among other claims, she was assigned more job responsibility, while analysts who worked under her were removed; received hostile emails from Chan; and that Chan threatened to cancel her vacation time. She also received a "needs improvement" on her 2016 and 2017 evaluations that prevented her from receiving wage increases.

The Southern District concluded, and the parties did not dispute, that Carr established a *prima facie* case of discrimination, and the defendants proffered a nondiscriminatory reason for not promoting her. Explaining its rationale, the trial court found that the men who were promoted worked at the NYCTA longer, had technical backgrounds, and interviewed better. The Second Circuit upheld the District Court's disputed finding on appeal that Carr failed to show pretext. There was nothing inconsistent about NYCTA's explanations for promoting the two men.

Turning to the retaliation claims, the Second Circuit clarified its standard. The Court held that "to establish a prima facie case of retaliation, a plaintiff must demonstrate that (1) she engaged in protected activity, (2) the defendant was aware of that activity, (3) she was subjected to a retaliatory action, or a series of retaliator actions, that were materially adverse, and (4) there was a causal connection between the protected activity and the materially adverse action or actions." To be "materially adverse" an action must be one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

The lower court however, incorrectly applied the higher hostile work environment standard which requires the plaintiff to show that "the retaliatory actions were sufficiently severe and pervasive that they altered the terms and conditions of employment." But, the Second Circuit held that "[a]ll that is relevant is whether the actions, that in the aggregate, are materially adverse and would dissuade a reasonable employee from making a complaint of discrimination."

Here the court found that the alleged retaliatory actions – hostile emails, more work duties, reassignment of subordinates – were not materially adverse, but the result of generally applicable workplace policies. There was no evidence these policies were applied to her and not others. The evidence showed she received negative performance evaluations because her tasks were not timely or adequately completed and she became challenging to work with. Further, while she received poor performance reviews after filing a complaint, temporal proximity alone is insufficient to show pretext. Therefore, the Second Circuit upheld the lower court's granting of summary judgment.

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