

RECREATION SUPERVISOR GENDER DISCRIMINATION

James C. Kozlowski, J.D., Ph.D.
© 2006 James C. Kozlowski

In the case of *Demoret v. Zegarelli*, No. 05-1831-cv (2nd Cir. 6/8/2006) (2nd Cir., 2006), two female employees of the Village of Sleepy Hollow (N.Y.) alleged the Village mayor and administrator had exposed them to a “hostile work environment [and] disparate treatment because of their gender,” effectively denying them of their civil rights under 42 U.S.C. § 1983 and the Equal Protection Clause of the Fourteenth Amendment.

Plaintiff Theresa Demoret was the secretary and assistant to Village mayor, Phillip Zegarelli, and Village administrator, Dwight Douglas. Plaintiff Robin Pell was the Village recreation supervisor, having worked previously for the Village as director of the summer day camp and manager of the fall festival

In her complaint, plaintiff Pell claimed that “Douglas spoke to her in a condescending manner and did not extend social pleasantries, such as saying hello or good morning, that he offered to male colleagues.” On one occasion at a Village function, Pell claimed Douglas commented to her in front of two other town employees that “she looked nice and that she should dress that way more often, because when she wears a sweatsuit her IQ must drop 20 points.” Pell also claimed that Douglas accused her being insubordinate when she disagreed with him.

In addition, Pell maintained that Douglas “used a different tone of voice to speak to her than the one he used to speak to male colleagues at the department head meetings.” According to Pell, when she complained to Douglas that he did not treat her the same as male department heads, Douglas accused her of being “too emotional.”

As characterized by Pell, Zegarelli and Douglas had also made comments at a sexual harassment seminar for Village employees which were indicative of a “hostile work environment.”

Mayor Zegarelli said that the seminar would be pointless for some Village employees. He permitted jokes about the seminar during a department head meeting, and he joked about the amount of litigation against the Village. Village Administrator Douglas commented that the Village was holding the seminar because “women do foolish things.” Pell found these comments offensive.

Pell also alleged that “Douglas micromanaged her assignments and harassed her.” Specifically, Pell objected to Douglas’s “reviewing assignments with her in a detailed manner and giving her lists of tasks to complete.” She also maintained that Douglas “scrutinized her department's budget and expenditures more than he examined the budgets of other departments that were run by male department heads.”

In terms of gender discrimination based upon disparate treatment, Pell claimed she was “treated differently from the male department heads, especially with respect to pay issues.” According to Pell, she was “paid a lower salary than male employees of the Village at her level” and was “even paid less than two of her male subordinates.” In comparison to her starting salary of

\$40,000, Pell claimed her male predecessors were paid \$48,000, despite the fact that one of her predecessors only held the recreation supervisor position for two months.

According to Pell, "her male counterparts -- the other department heads -- regularly received stipends or extra money for performing duties beyond their regular roles." Pell, however, claimed she had never received the extra compensation promised by the mayor when she ran the Village's day camp in addition to her other duties as recreation supervisor instead of hiring a separate day camp supervisor.

In addition, Pell claimed "male department heads were permitted to supplement their base salaries substantially, which were already higher than Pell's salary, by earning overtime." As described by Pell, she was "not allowed to accumulate comp time or overtime pay."

Douglas required her to submit her work schedule to him in advance, and he would instruct her to take off more time from work so that she did not accumulate overtime. The Administrator accused Pell of taking overtime without permission and threatened her with disciplinary charges for unauthorized overtime. Although she was not in fact charged, Douglas's scrutiny limited her ability to earn overtime by working evenings and weekends.

In contrast, Pell maintained that "Douglas did not similarly require male department heads to scale back their hours or to limit their overtime." Pell claimed further that she was "eligible for a promotion and pay increase for passing the civil service test for superintendents, but the Village declined to change her job title to recreation superintendent even after she qualified for that position." Since one of her male predecessors had held the title of recreation superintendent, Pell alleged the Village's refusal to change her title was discriminatory because she was "doing the job of her predecessors and providing more services than they did."

PRIOR PROCEEDINGS

Pell brought an equal protection claims against the Mayor and Village Administrator under 42 U.S.C. § 1983 (Section 1983). Section 1983 allows an action at law against a "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. In her Section 1983 complaint, Pell alleged that the mayor and administrator Douglas had deprived her of her constitutional rights under the Fourteenth Amendment rights to be "free from discrimination."

Defendants moved for summary judgment based on "qualified immunity." Under Section 1983, government officials are protected from civil liability when performing discretionary duties. Such "qualified immunity," however, is applicable only "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

In the opinion of the federal district court, Pell had alleged sufficient evidence to establish a hostile work environment and disparate treatment in violation of her established constitutional

rights. As a result, the federal district court denied the Village's motion for summary judgment based on the qualified immunity of the mayor and the administrator. The Village appealed.

QUALIFIED IMMUNITY

On appeal, the issue before the federal circuit court was, therefore, whether qualified immunity applied to the government officials under the particular circumstances of this case. As described by the court, qualified immunity would apply if the government officials in this instance could "establish that it was objectively reasonable for them to believe their actions were lawful at the time."

In deciding whether qualified immunity applies, the threshold inquiry is whether the plaintiff's version of the facts shows the officer's conduct violated a constitutional right. If no constitutional or statutory right was violated... we need not conduct further inquiries concerning qualified immunity.

If on the other hand, a violation could be made out... the next, sequential step is to ask whether the right was clearly established. A defendant is entitled to qualified immunity only if he can show that, viewing the evidence in the light most favorable to plaintiffs, no reasonable jury could conclude that the defendant acted unreasonably in light of the clearly established law.

Applying these principles to the facts of the case, the appeals court had to determine whether "Mayor Zegarelli and Village Administrator Douglas could be found to have violated plaintiffs' equal protection rights." As noted by the court, "sex-based discrimination may be actionable under § 1983 as a violation of equal protection." Specifically, the court found that Section 1983 and the Equal Protection Clause "protect public employees from various forms of discrimination, including hostile work environment and disparate treatment, on the basis of gender."

HOSTILE WORK ENVIRONMENT

As described by the appeals court, Pell would have to provide evidence of an abusive situation in order to establish her gender discrimination Section 1983 claim based upon the existence of a hostile work environment:

In order to establish a claim of hostile work environment, a plaintiff must produce evidence that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Plaintiff must show not only that she subjectively perceived the environment to be abusive, but also that the environment was objectively hostile and abusive. Isolated incidents typically do not rise to the level of a hostile work environment unless they are of sufficient severity to alter the terms and conditions of employment as to create such an environment. Generally, incidents must be more

than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.

To analyze a hostile work environment claim, we look to the record as a whole and assess the totality of the circumstances, considering a variety of factors including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. We must also consider the extent to which the conduct occurred because of plaintiffs' sex.

Applying these principles to the facts of the case, federal appeals court rejected Pell's complaint of a hostile work environment. In the opinion of the court, Pell's allegations were "insufficient as a matter of law to meet the threshold of severity or pervasiveness required for a hostile work environment." Citing Pell's allegations that Douglas reviewed her budget with "fine-toothed comb" and his criticism of her for being five minutes late for meetings "even though male employees could skip meetings with impunity," the court found "nothing in the record to indicate that the environment faced by Pell was so severe as to be abusive." As a result, the appeals court concluded that Douglas and the mayor were entitled to "qualified immunity" on Pell's Section 1983 claim. The appeals court then considered Pell's gender discrimination claim based upon her allegation that she was "treated differently than similarly situated male employees of the Village."

DISPARATE TREATMENT

As described by the appeals court, Pell's allegations of unequal treatment would be analyzed under the following framework applied by courts to resolve claims of "disparate treatment":

The plaintiff must first establish a prima facie case [i.e. "on its face" sufficient evidence to establish a claim] by demonstrating that: (1) she is a member of a protected class; (2) her job performance was satisfactory; (3) she suffered adverse employment action; and (4) the action occurred under conditions giving rise to an inference of discrimination.

If the plaintiff demonstrates a prima facie case, the burden shifts to the defendant employer to provide a legitimate, non-discriminatory reason for the action. If the defendant makes such a showing, the burden shifts back to the plaintiff to prove discrimination, for example, by showing that the employer's proffered reason is pretextual.

As noted by the appeals court, the Village did not dispute the fact that Pell was "a member of a protected class" based on her gender. Similarly, the Village conceded that Pell had "performed her job duties satisfactorily." As a result, the appeals court found Pell had satisfied the first two requirements for establishing a prima facie case of disparate treatment. Accordingly, the court found Pell would have to show that "she suffered adverse employment action" in order to satisfy the third prong of the "disparate treatment" test.

As defined by the appeals court, an “adverse employment action” is a “materially adverse change in the terms and conditions of employment that is more disruptive than a mere inconvenience or an alteration of job responsibilities.”

Examples of materially adverse changes include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation.

In this particular instance, the appeals court found that “[s]ome of the actions about which Pell complains were not adverse employment actions.

She cannot premise a claim on her various office moves. Defendants were not employed by the Village when the first move occurred, and her newest office was in her view better than the office she occupied when Zegarelli became Mayor. Nor can she premise a claim on the fact that the Village assigned her a Jeep to use instead of a Ford.

In contrast, the appeals court found some of Pell’s other allegations “more comfortably satisfy the third prong’s requirement of an adverse employment action.”

Pell alleges she was paid considerably less than other department heads, all of whom were male. She was paid less than her predecessors even though she took on more responsibility than they had. She was even paid less than subordinate male employees that she supervised. Pell alleges also that, beginning in 2002, she was not allowed to earn overtime pay or comp time and that she was the only employee required to submit written requests to work overtime.

In addition, the appeals court found that the Village’s “failure to promote Pell to superintendent and the transfer of her employees to another department, which are relevant to her wage claim, may also constitute adverse employment actions.

At least one of her predecessors held the title of superintendent, and Zegarelli and Douglas moved quickly to give the title to another male department head around the same time that Pell was denied the title. Further, the transfer of her employees constitutes “significantly diminished material responsibilities.”

Based upon these facts, the appeals court concluded that “Pell’s allegations regarding her pay, lack of promotion, and removal of supervisory responsibilities form sufficient showings of adverse employment action” to satisfy the third prong for establishing a prima facie claim of “disparate treatment.” In addition, the appeals court found that the above cited “circumstances surrounding the adverse employment actions” alleged by Pell gave rise to “an inference of gender discrimination,” thus satisfying the fourth prong of the disparate treatment requirements.

These actions must be seen in the context of Douglas’s micromanaging and offensive comments and Zegarelli’s failure to respond to her expressed

concerns... [A]lthough the treatment complained about by plaintiffs does not rise to the level of a hostile work environment, it does support Pell's claim of disparate treatment on the basis of gender.

On appeal, the Village had argued that “the actions about which Pell complains were the results of nondiscriminatory managerial decisions, including budget concerns.” The appeals court rejected this argument. In the opinion of the appeals court, Pell had offered “sufficient evidence that male department heads were given raises and allowed more leeway regarding spending during the relevant time period.” As a result, based upon the facts of this case, one “could reasonably conclude that Zegarelli and Douglas's managerial reasons were pretextual and that the real reason was discrimination.” In light of such evidence of disparate treatment, the appeals court agreed with the lower court’s determination that “Zegarelli and Douglas were not entitled to qualified immunity on Pell's equal protection claims.”

As a result, the federal appeals court held that “Zegarelli and Douglas are not entitled to qualified immunity on Pell's claims of disparate treatment regarding her pay, title, and supervisory responsibility, and Pell may proceed against the individual defendants and the Village with those claims under § 1983.”