EFiled: Sep 17 2014 10:55AM EDT
Filing ID 56044908
Case Number 322,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CORINE TERMONIA,	:	
	:	**C.A. 322, 2014**
Plaintiff Below/	:	
Appellant,	:	**On Appeal from the**
	:	**Superior Court of the State**
v.	:	**Delaware in and for New**
	:	**Castle County,**
	:	**C. A. No. 10C-12-174 ALR**
BRANDYWINE SCHOOL DISTRICT,	:	
	:	
Defendant Below/	:	
Appellee.	:	
	:	

APPELLANT'S REPLY BRIEF ON APPEAL FROM THE SUPERIOR COURT IN AND FOR NEW CASTLE COUNTY

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September 17, 2014

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I. THERE IS A QUESTION OF FACT FOR THE JURY TO DECIDE AS TO WHETHER THE ADVERSE ACTIONS THAT BSD TOOK AGAINST TERMONIA WERE PROXIMATELY CAUSED BY HER PROTECTED ACTIVITY.

A. The Superior Court Failed to Take All Inferences in the Non-Moving Party's Favor in Determining Whether Summary Judgment Should be Granted. The Superior Court correctly set forth the standard of review for summary judgment in that it is the moving party's burden to show no issue of fact and all inferences are given to the non-movant, but then in reality ignored it and substituted itself for the jury in resolving the key issue of fact - what was the reason Termonia was given the notice of indefinite unpaid suspension and recommendation of termination? Was it because she filed a lawsuit and litigated it, was it the fact that she interviewed a student about an incident with the Principal during class time, or were both causes of the end result? It cannot be ignored that there remains a real factual dispute as to what BSD's motivation was.

The Superior Court held that assuming the notice of unpaid suspension and notice of recommendation of termination were adverse actions, summary judgment should still be granted, simply because BSD offered a legal reason for taking the adverse actions against Termonia. (Ex. B to Appellant's OB, 5/22/14 Hring., p. 33:9-41:13; see Ex. A to Appellant's OB, p.16-17). The Court below ignored the fact that BSD's ability to offer a non-retaliatory excuse for taking the actions it did

is not the end of the inquiry – if there is evidence to show that the claimed reason is pretext, or if there is direct evidence of retaliatory animus, the case must go to the jury. Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

That Termonia filed other claims of discrimination and retaliation, which BSD discusses at length in Appellee's Answering Brief, is irrelevant to the narrow issue before this Court. That student J. claimed that Termonia made a reference about the size of Dr. Thompson's "genitals" and referred to J. as acting like an "ass" in class, which BSD also discusses at length, is also irrelevant. BSD did not give Termonia's colorful language as a reason for giving her an indefinite, unpaid suspension and recommending her termination. (A94-95 A278-79).

The Superior Court erred by not finding there was a question of fact as to whether Termonia was retaliated against because of her protected activity, given that there was evidence: 1) that BSD's claimed reasons for taking adverse actions were pretext, 2) of retaliatory animus by decision makers, 3) of a pattern of antagonism, and 4) of past retaliation. This evidence is sufficient to meet the prima facie causation prong, and thus summary judgment should have been denied.

B. There is Evidence Sufficient for Causation. There is sufficient evidence for causation. As to causation, there were only four months between the time Termonia filed her lawsuit (December 20, 2010) and BSD's recommendation of her termination. (April 21, 2011). Regardless of whether the intervening act of

interviewing a student was protected activity, the temporal proximity between the filing of her lawsuit (admittedly a protected activity) and the notice of unpaid suspension/recommendation of termination, coupled with other evidence in the record, is sufficient evidence of causation. See E.E.O.C. v. L.B. Foster Co., 123 F.3d 746, 749, 754 (3d. Cir.1997) (finding that employee's protected activity and the adverse employment action were "sufficiently close together to allow a reasonable factfinder to infer the required element of causation" for prima facie case, where the adverse action occurred a "few months" after the employee engaged in protected activity); Kachmar v. SunGard Data Systems, Inc., 109 F.3d 173, 178 (3d Cir.1997) (where employer argued that adverse employment action taken four months [the same amount of time as in Termonia's case] after employee engaged in protected activity was too long to establish causation as a matter of law, the Court disagreed and explained there were no set parameters but cases "were decided in the context of the particular circumstances before us").

When in addition to close temporal proximity there is evidence of pretext, retaliatory animus, retaliatory conduct in the past, and antagonism, then there is more than sufficient evidence from which a jury may ultimately conclude that plaintiff's protected activity was a cause of the adverse action taken against her. In other words, because Termonia presented evidence from which a reasonable jury could determine that BSD would not have decided to give her an unlimited unpaid

suspension or recommendation her termination for reasons of immorality, misconduct in office, disloyalty, and neglect of duty, had she not engaged in protected activity, there is evidence of causation. BSD waited for an excuse to get rid of Termonia and once it received that excuse, put in motion its efforts to get rid of her.

C. The Meaning of But-For Causation or Proximate Cause. In Burrage v. United States, the United States Supreme Court made clear that there can be more than one proximate or "but-for" cause of an adverse action. In discussing the meaning of but-for causation the Court cited to its earlier ruling in a Title VII retaliation case:

> Last Term, we addressed Title VII's antiretaliation provision, which states in part:
>
> "It shall be an unlawful employment practice for an employer ... to discriminate against any individual ... *because* he has opposed any practice made an unlawful employment practice by this subchapter, or *because* he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e–3(a) (2006 ed.) (emphasis added).
>
> Given the ordinary meaning of the word "because," we held that § 2000e–3(a) "require[s] proof that the desire to retaliate **[]** was **[a]** but-for cause of the challenged employment action." *Nassar*, *supra*, at ——, 133 S.Ct., at 2528. [citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) ("To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision.")]

Burrage v. United States, 134 S. Ct. 881, 888-89 (2014) (emphasis added).

The Supreme Court in Burrage re-wrote its language in Gross when it changed "the" to "a" in front of the words "but for." This negates any argument that protected activity must be the "sole cause." "But for" causation simply means that Termonia's protected activities were *a* necessary cause of the retaliatory action by the employer, not the sole cause. Miller v. CIGNA Corp., 47 F.3d 586, 594 (3d Cir. 1995). This Court has explained that there can be more than one proximate or "but-for" cause in the tort context, which is no different than Title VII context, on many occasions. Sheehan v. Oblates of St. Francis de Sales, 15 A.3d 1247, 1255-56 (Del. 2011) ("the special verdict form impliedly instructed the jury to apply an incorrect legal standard which required the Oblates' negligence to be "the" sole proximate ***[]** cause rather than "a" proximate cause of Sheehan's injuries."); Culver v. Bennett, 588 A.2d 1094, 1099 (Del. 1991) ("it is not how little or how large a cause is that makes a legal cause, for a proximate cause is any cause which in a natural and continuous sequence produces the injury and without which the result would not have occurred."); Money v. Manville Corp. Asbestos Disease Compensation Trust Fund, 596 A.2d 1372, 1375 (Del. 1991) (same).

"But-for" Termonia's engagement in protected activity, BSD would not have reacted to the J.S. complaint with a formal notice of indefinite unlimited unpaid suspension and recommendation of termination, i.e. her harm would not have occurred. It is clear from the comparison of Termonia's treatment versus

other employees who had not engaged in protected activity that Termonia's protected activity was a necessary, determinative cause of the BSD's adverse actions.

With respect to BSD's argument that there were other employees who were recommended for termination based on immorality, misconduct in office, disloyalty, or neglect of duty, plaintiff requested this information from BSD in interrogatories. BSD stated in its responses that it was unable to respond to the interrogatory because it did not keep records of employees who receive notices of termination based on reason. (A295-300). The other employees who were recommended for termination for the same reasons as Termonia are identified in BSD's answers to interrogatories and Doherty's deposition testimony. Termonia has cited all the record evidence in this matter of other employees who received a notice of recommendation of termination for the same enumerated reasons as she did, which shows that other employees who were recommended for termination for the same reasons as Termonia had either committed crimes or been subject to progressive discipline, and had not engaged in protected activity.

D. Termonia Engaged in Protected Activity by Participating in the Litigation of her Case. What Termonia did in interviewing student J. was not against any formal BSD policy that would have placed her on notice that she could be reprimanded for doing so. In fact, Termonia believed and discovery has

confirmed that interviewing students during class time was done all the time without incident or reprimand. Surely it constitutes participation in her own lawsuit – Termonia was trying to prove that Thompson had lied during the grievance hearing. Her interview of J. did uncover this lie which Doherty **admitted**. ((A0207-208, Doherty 83:12-84:14). Thompson had chosen a less qualified teacher for World Languages Head, had refused to interview her for an assistant principal position and chosen a candidate with much less experience, had forced student J. back into a classroom Termonia had sent her out of because she was misbehaving, and then lied about this incident during the grievance hearing. Of course Termonia believed he was discriminating and retaliating against her. It is Termonia's position that Thompson had to be aware of her first lawsuit because it was during the mediation of that lawsuit that Termonia raised the issue of his choice for World Languages Head to the Judge (mediator) and to BSD's lawyer, and it was as a result of her complaints during the mediation that Termonia was then given the position of World Languages Head by Dr. Thompson. (A0035-38, Term. 50:5-53:13; A0039-43, 97:13-101:1). This is circumstantial evidence that Thompson was made aware of the lawsuit: it was the reason that he was forced to give Termonia the position that she was obviously the most qualified for.

The cases BSD cites for the proposition that wrongful conduct cannot be protected activity all involve clear violations of formal policy – in Laughlin the

secretary stole personnel documents from her employer[1] and in Niswander the employee "provided an unspecified number of documents [that were confidential according to employer written policy] to her lawyers that did nothing more than jog her memory about incidents that she believed constituted retaliation." Niswander v. Cincinnati Ins. Co., 529 F.3d 714, 718, 727 (6th Cir. 2008). It is black letter law that criminal acts cannot constitute protected activity. It is acts that are not obviously criminal or against any formal policy of the employer that should be considered protected, if done in an effort to participate in one's own lawsuit based on discrimination and retaliation.

E. Termonia Does Not Admit She Should Have Been Suspended. First, the only reasons BSD gave in this case for recommending an indefinite unpaid suspension and termination were Termonia's interview of J. and failure to sign out during her planning period, her last period of the day when she had no students. (See A94-95, A278-79). Doherty's proposed reasons for recommending termination were given to Holodick in the April 21, 2011 recommendation to Holodick (A278-79) and the final recommendation was given to Termonia in Holodick's August 26, 2011 notice letter to her. (A94-95). In Holodick's letter, BSD couched this same basic action of Termonia interviewing J. in a variety of different ways: used a student to further her personal litigation, shared confidential

[1] Laughlin v. Metro Wash. Airports Auth., 149 F.3d 253, 256 (4th Cir. 1998).

personnel information that was Termonia's to share, failed to communicate with J.'s parent(s) or an administrator about it (which was never a rule), referred to Dr. Thompson as a liar, but it all happened during the same single transaction of Termonia asking J. for a statement. Never given as one of the reasons given for recommending Termonia's termination was that Termonia made inappropriate comments about the size of the principal's "genitals," told J. to lie, or said the word "ass." (Appellee's Ans. Brief pgs. 6, 17). It is the claimed reasons by BSD for recommending Termonia's termination that matter in this analysis, which do not include Termonia's colorful language.

Termonia has never admitted she should have been suspended. She simply argues that the first discipline in her 20 year history as a teacher should not have been a Notice of Indefinite Unpaid Suspension (to begin the following day) and Recommendation of Termination. If any discipline was warranted, a progressive discipline should have been used, as was common at BSD and instituted for worse employee actions. A notice of reprimand letter, implementation of a performance improvement plan, a one-day suspension, a three-day suspension, or even a ten-day suspension, are all lesser disciplines on the progressive discipline matrix. Notice and Recommendation of Termination is not an appropriate response to such a first time offense for a 20 year veteran exemplary employee, and it would not have been taken if Termonia had not fought for her rights under Title VII and the DDEA.

F. Doherty and Holodick's Statements are Evidence of Retaliatory Animus. Doherty's and Holodick's statements speak for themselves, and there is no evidentiary support for what BSD suggests that they meant by those statements. The statements clearly reflect a disdain for Termonia having filed her lawsuit. "If [] the plaintiff's nonstatistical evidence is directly tied to the forbidden animus, for example policy documents or **statements of a person involved in the decisionmaking process that reflect a discriminatory or retaliatory animus of the type complained of in the suit,** that plaintiff is entitled to a burden-shifting instruction." Ostrowski v. Atl. Mut. Ins. Companies, 968 F.2d 171, 182 (2d Cir. 1992). Termonia's direct evidence is similar to that found in Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 550 (10th Cir. 1999), where the employer admitted that testimony from plaintiff's deposition was the reason for his suspension. The employer argued that it was not the act of giving a deposition that caused his suspension, but rather some testimony about actions of the plaintiff which the employer found against policy and worthy of suspension. However, the Tenth Circuit held that "On its face, defendant's suspension letter admits that defendant considered the subject matter of plaintiff's deposition in its decision to terminate him, a deposition which included testimony about his Title VII race discrimination claim" and thus was sufficient to constitute direct evidence of retaliatory animus. Id.

II. NOTICE OF INDEFINITE UNPAID SUSPENSION AND NOTICE OF RECOMMENDATION OF TERMINATION ARE CLEARLY ADVERSE ACTIONS TO ANY REASONABLE EMPLOYEE .

A. The Court Below Clearly Used the Wrong Standard to Analyze

Adverse Action; and then "Punted" on the Issue. It is clear that the Superior Court used the wrong standard to analyze whether BSD's actions were adverse in Termonia's retaliation case. Under the heading of "Plaintiff's Claims of Retaliation," the Superior Court held that an adverse employment action in a claim of retaliation is defined as:

> a significant change in employment status, such as hiring, firing, failing to promote, reassignment, or a decision causing a significant change in benefits. []The adverse action must be serious and tangible enough to alter employee's compensation, terms, conditions, or privileges of employment.

Termonia v. Brandywine Sch. Dist., 2014 WL 1760317, * 4 (Del. Super. Apr. 16, 2014). For this proposition the Court cited Conley v. State, 2011 WL 113201, * 4 (Del. Super. Jan. 11, 2011) (quoting Burlington Indus. v. Ellerth, 524 U.S. 742, 749 (1998) and Grande v. State Farm Mut. Auto Ins. Co., 83 F. Supp. 2d 559, 563 (E.D. Pa. 2000). Id. These cases are inapplicable as they discuss the meaning of "adverse action" in a Title VII discrimination case, which is a higher burden which requires an adverse action to affect employment status or the terms and conditions of employment. Then the Superior Court cited to Robinson v. Pittsburgh, 120 F.3d 1286, 1300 (C.A.3 1997) for the standard for retaliatory adverse action, which was abrogated by the United States Supreme Court by Burlington N. & Santa Fe Ry.

Co. v. White, 548 U.S. 53, 60, 67 (2006), precisely because it, like the Court below, used the higher "terms and conditions of employment" discrimination standard. The Superior Court then erroneously held that because there was no "official" termination there was no adverse action. Termonia, 2014 WL 1760317, * 6. Clearly, the Superior Court was analyzing retaliatory adverse action under the higher discrimination standard. This is not a case of taking a sentence out of context to the exclusion of the rest of the Superior Court's analysis. (Appellee's Ans. Brief, p. 14, footnote 9). BSD acknowledges, as it must under any reasonable reading of the case law, that the standards for adverse action in retaliation versus a discrimination cases are different and that the standard for retaliation is less stringent and does not require any change in employment status, terms or conditions. (Ex. B to Appellant's OB, 5/22/14 tr. p. 15:1-17).

B. **Notice and Receipt of Unpaid Suspension are Adverse Actions in a Retaliation Case**. Adverse actions in a retaliation case are defined as employer's actions that are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006). Any reasonable worker would be dissuaded or discouraged from making a claim of discrimination or retaliation if the employee had to face receiving a notice of indefinite unpaid suspension and/or or a notice of recommendation of termination as a result of making such claims.

What employee would make or support a claim when he or she would have to face such actions by an employer? Receipt of a notice of either an unpaid suspension or recommendation of termination by one's employer, let alone both, is something that would make any reasonable employee hesitant to assert his or her rights to be free of discrimination and retaliation. This is especially true when these notices were formal, official notices of BSD's intent to take these actions, not merely a flippant remark or rumor.

The Superior Court and BSD should not have been surprised when plaintiff filed her motion for reargument below reminding the Superior Court that notice of and receipt of unpaid suspension was one of the adverse actions plaintiff claimed she suffered: it was in her summary judgment briefs and explicitly discussed by the Court and counsel at summary judgment oral argument. (SJAB 1, p.5-6, SJAB 2, p.3, 6, 20 , Oral argument Transcript 1/15/14 p. 8:9-20 ("….[she was] suspended without pay, [] that's clearly an adverse action…[]"), 8:21-23, 9:15-16, 10:4-8, 27:21-23 (the Court explains "Then we get to the student incident again and the suspension, first with pay, and now we understand better, then without pay"), 39:20 (Court discusses the "ultimate suspension without pay"), p. 40:14-18) (Exhibit A).

The fact that plaintiff was put on notice that she would be on an indefinite unpaid suspension beginning the following workday, August 29, 2011, is enough

to constitute an adverse action under the retaliation standard. As the United States Supreme Court has held, "[A]n indefinite suspension without pay could well act as a deterrent, even if the suspended **[]** employee eventually received backpay." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 73 (2006). While in Burlington N. the unpaid suspension lasted 37 days and was eventually rescinded and paid back, the same reasoning applies. BSD mistakenly cites Lanza v. Donahue, 2013 WL 5477160, *6 (D.N.J. September 30, 2013) for the proposition that this cannot be so. (Appellee's Ans. Brf., p. 15). Lanza was not a Title VII retaliation case, as Termonia's case is, despite Appellee's claim that it was. (Appellee's Ans. Brf., p. 15). It was a discrimination case. "Plaintiff Deborah Lanza ("Plaintiff"), a former employee of the USPS, filed this action against Defendants for ***gender discrimination*** violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. ("Title VII")…[]." Id. at * 1 (emphasis added).

As discussed in Appellant's opening brief discrimination cases have a higher standard for what is an adverse action – the adverse action in a discrimination case must affect the status or terms and condition of employment while in a retaliation case it does not need to affect any terms or conditions of employment. It simply has to be some action by the employer which would dissuade a reasonable person from opposing illegal discrimination. Lanza held that a suspension that was later rescinded could not be an adverse action under the higher discrimination standard.

Id. p. *6 ("In evaluating the facts in the light most favorable to Plaintiff, the Court finds that Plaintiff **has not established a prima facie case for gender discrimination…[because] Plaintiff has failed to demonstrate that she suffered an adverse employment action**.") (emphasis added). Lanza discusses the standard for adverse action in a discrimination case, not a retaliation case. Id.

Later in that opinion, the Lanza Court stated "Plaintiff alleges that Defendants retaliated against her for maintaining limited duty assignment and/or for settling a worker's compensation claim stemming from a workplace injury that occurred in March 2006." Id. at * 9. The Lanza Court does not identify under which law the retaliation claim arose. (The Rehabilitation Act or Title VII). Id. The Lanza Court summarily states without analysis that "For the reasons outlined earlier in this Court's analysis, Plaintiff is unable to make a prima facie case for retaliation given the absence of adverse employment action by Defendants." Lanza 2013 WL 5477160, * 9. On appeal, the Third Circuit explained that Lanza did not identify under which law – the Rehabilitation Act or Title VII – Lanza's claim arose. Lanza v. Postmaster Gen. of U.S., 2014 WL 2898535, * 4 (3d Cir. June 27, 2014). The Third Circuit held that Lanza's retaliation claim, if asserted under Title VII, would fail because filing a workers' compensation claim was not protected activity under Title VII. Id. This case does not stand for the proposition that

receiving a notice of unpaid suspension – that is NOT rescinded – cannot constitute adverse action under Title VII.

Further, Termonia's notice and receipt of unpaid suspension and notice of termination were never rescinded. She did go out on disability (as a result of receiving these notices) sometime during her first day of unpaid suspension on August 29, 2011, but as BSD informed her, if she ever returned from disability, its efforts against her would continue. (A96-97).

The fact that as a result of her receipt of both the indefinite unpaid suspension and the formal notice of recommendation from BSD, plaintiff became disabled as a result of depression and post-traumatic stress, should not absolve BSD from the harm it caused her by taking adverse retaliatory actions. "An employer who retaliates can not escape liability merely because the retaliation falls short of its intended result." E.E.O.C. v. L.B. Foster Co., 123 F.3d 746, 754 (3d Cir. 1997). "[I]f an employee is unable to work because of a disability 'caused' by the employer, the employee may obtain compensation for the resulting lost pay." Tobin v. Liberty Mut. Ins. Co., 553 F.3d 121, 141 (1st Cir. 2009) (citations omitted). See Deavenport v. MCI Telecomms. Corp., 973 F. Supp. 1221, 1227 (D. Colo. 1997) (citing Whatley v. Skaggs Co., 707 F.2d 1129, 1138 (10th Cir. 1983) (same). As Termonia and her expert psychiatrist will testify, BSD's retaliatory actions caused plaintiff's disability. Therefore the fact she became disabled does

not bar her right to recovery. To demonstrate constructive discharge a plaintiff "must show working conditions so intolerable that a reasonable person would have felt compelled to resign." Pennsylvania State Police v. Suders, 542 U.S. 129, 147 (2004) (citations omitted). Such claims are recognized under the DDEA and in Delaware. Lipson v. Anesthesia Servs., P.A., 790 A.2d 1261, 1280 (Del. Super. 2001) (citations omitted). Termonia did not voluntarily resign, because she was forced to take disability as a result of BSD's retaliation toward her, however she was in essence constructively discharged as her working conditions were so intolerable she became disabled by depression and PTSD. Certainly the BSD did not intend to rescind or not follow through with giving Termonia an indefinite unpaid suspension and recommending her termination.

None of the cases cited by BSD hold that a formal notice and receipt of indefinite unpaid suspension and formal notice of recommendation of termination are not adverse actions. In Gonzales v. Potter, 2010 WL 2196287, * 6 (W.D. Pa. June 1, 2010) the Court analyzed the plaintiff's claims that a *rescinded* proposed termination was adverse action under the higher discrimination standard, not the retaliation standard. Gonzalez v. Potter, 2010 WL 2196287, * 6 (W.D. Pa. June 1, 2010) (citing, *inter alia*, Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir.1997), which was abrogated as to retaliation claims by Burlington N. & Santa Fe Ry., Co. v. White, 548 U.S. 53, 61, 67 (2006)). In Hellman v. Weisberg, 360 F.

App'x 776, 779 (9th Cir. 2009) the plaintiff was informed by someone other than her supervisor that her supervisor wanted to fire her. There was no formal recommendation of termination. Finally, in Ilori v. Carnegie Mellon Univ., 742 F. Supp. 2d 734, 760 (W.D. Pa. 2010), the plaintiff's supervisor made verbal threats that were never carried out. None of these rise to the formality and significance of BSD's notice of intent to recommend termination.

CONCLUSION

Ms. Termonia is not in any way suggesting that after an employee has filed a lawsuit against his or her employer based on discrimination or retaliation, and during the litigation of that lawsuit, that employee is immune from discipline. However, according to the law, that employee cannot be punished for filing the lawsuit. That employee cannot and should not be treated more harshly than he or she would have been had they not filed the lawsuit. That is what happened here, there is evidence of it, and that is why this case belongs in front of a jury.

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