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DELAWARE

EMPLOYMENT LAW LETTER

Part of your Delaware Employment Law Service

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Vol. 14, No. 3
March 2009

EVIDENCE

Employee's case is wrapped up by court

by Michael P. Stafford

A recent decision from the U.S. District Court for the District of Delaware sheds light on the types of evidence employees need to demonstrate that they have been subjected to illegal discrimination in the workplace.

Facts

Judy Enders/Maden began working as a wrapper in the meat department at Super Fresh's Claymont store in August 1998. Throughout her employment, she reported directly to Rich Elliot, the meat department manager.

Like many employers, Super Fresh has a policy prohibiting sexual harassment. Its policy provides that "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature" are considered "sexual harassment" and will not be tolerated. The policy also provides a reporting procedure that states, "If you believe that you are being sexually harassed, you must report the matter immediately." Enders/Maden signed and dated the document, indicating that she had "read and understood the 'Policy

Prohibiting Sexual Harassment."

After returning from maternity leave in the fall of 2002, Enders/Maden requested schedule adjustments and additional leave, supposedly for child-care purposes. She claimed that Elliot ignored or denied her requests while granting similar requests by male coworkers. In August 2003, under the provisions of a collective bargaining agreement (CBA), Enders/Maden was "bumped" from full-time to part-time status in the meat department after a senior coworker returned to work. She then went on a medical leave.

In January 2004, Enders/Maden filed a charge of discrimination with the Delaware Department of Labor and the Equal Employment Opportunity Commission (EEOC). In her charge, she alleged that she had been discriminated against because of her gender between December 16, 2002, and August 16, 2003. Specifically, she claimed that she had been subjected to disparate treatment in scheduling and wages. She also claimed that Elliot had yelled at her. The charge didn't mention any allegations of sexual harassment. In March 2005, after she had been off work for nearly 18 months, Super Fresh terminated her.

On September 14, 2005, Enders/Maden filed a lawsuit in federal court alleging three types of gender discrimination: disparate treatment, hostile work environment, and disparate pay. According to the court, she claimed "that [Super Fresh], in a discriminatory manner, terminated her employment, denied her full-time employment status, and denied her scheduling requests. [She] further alleges that her immediate supervisor subjected her to inappropriate sexual touching."

Court's decision

Super Fresh asked the court to dismiss all of Enders/Maden's claims without a trial. The court granted the employer's request and dismissed her case after reviewing the evidence available to support each of her three claims.

First, with respect to the disparate treatment claim, the court noted that Enders/Maden had to demonstrate "that similarly situated non-members of the protected class were treated more

favorably than [she was]." Enders/Maden claimed that "male employees, when faced with similar circumstances, were not 'bumped' [to part-time status] but were afforded the opportunity to work at other stores and thus maintain a full-time, 40-hour work week." Super Fresh countered that the "bumping" occurred under the terms of the CBA, not because of her gender.

The court agreed, noting that the evidence demonstrated that Enders/Maden was "afforded the same opportunities given male employees in terms of working at more than one store location so as to maintain full-time status." The court also easily disposed of her claim that Super Fresh discriminated against her in terms of scheduling, pointing out that "during the entire time [she] worked at Super Fresh[,] all of the meat wrappers were women. Thus, . . . to the extent [she] received an unfavorable work schedule, it could not have been because of her gender."

In addition, the court rejected Enders/Maden's hostile work environment sexual harassment claim. She claimed that her supervisor, Elliot, screamed and yelled at her in front of customers and touched her "breast and rear end." However, Super Fresh had promulgated a policy prohibiting sexual harassment in the workplace and establishing a reporting procedure for harassment claims. The company had proof that Enders/Maden had received the policy. Aside from one complaint about shift scheduling, she had never claimed that she was being harassed. Indeed, her EEOC charge had no mention of any sexual harassment.

Finally, the court observed that Enders/Maden's pay discrimination claim was untenable because all the meat wrappers employed at the Claymont store during the course of her employment were female. Consequently, there were no similarly situated male employees receiving higher pay for similar work. *Enders/Maden v. Super Fresh*, Civ. No. 05-669-JJF (D. Del., Jan. 27, 2009).

Bottom line

This case highlights the types of evidence an employee will need to support allegations of discrimination. The employee's

failure to complain to her employer about alleged harassment and her inability to identify any similarly situated male coworkers doomed her case.

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