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‘Right-wing’ speech helps workplace claims survive dismissal

Plaintiff says ‘MAGA’ enthusiasts targeted him, Jewish co-worker

■ **Kris Olson**

When coupled with more overtly discriminatory conduct, harassing and offensive actions less clearly directed at a plaintiff’s religion could help claims under G.L.c. 151B for hostile work environment and disparate treatment survive dismissal, a Superior Court judge has decided.

In *Brzuchalski v. Digital Guard, LLC, et al.*, the plaintiff, a Jewish man, alleges that a group of outspoken and self-proclaimed “right-wing conservative” co-workers discriminated against him and the only other Jewish employee in his work group and that his company’s response to his complaints was inadequate.

He also claims that the company owes him commissions he had earned, and that the employer retaliated when he made those commissions an issue in negotiations over a severance agreement.

In its motion to dismiss, the defendant company argued that the plaintiff’s allegations “lack the necessary connection to plaintiff’s religion” and fail to establish that the company “knew of, or otherwise condoned discriminatory treatment or a hostile work environment.”

But Judge Christopher K. Barry-Smith found that the complaint sufficiently tied the plaintiff’s religion to at least some of the conduct, and sufficiently alleged the company knew of the conduct and the animus behind it.

“These allegations are enough to raise a jury question concerning the severity of the harassment and its impact on [the plaintiff’s] work,” Barry-Smith wrote.

The 20-page decision is Lawyers Weekly No. 12-029-22.

INVESTIGATION FOUND LACKING

The plaintiff’s attorney, Mark M. Whitney of Marblehead, said *Brzuchalski* offers a reminder that employers need not tolerate what in other contexts might be legitimate political expression.

The plaintiff claims the defendants were not shy about expressing their support for views he connected to the ‘MAGA movement.’ *(SIPA USA VIA AP)*

“There are no First Amendment rights in a private workplace,” said Whitney, who worked as a management-side employment attorney for two decades.

Given all the connotations that come with it, doing something like displaying a “Don’t Tread on Me” flag is “envelope-pushing conduct, at a minimum,” which companies do not have to tolerate, Whitney said.

“All it does is increase the risks of other behavior to the company,” he said.

The defendants’ attorney, James M. Nicholas of Boston, declined to comment beyond saying in an email that he was disappointed with the decision and confident that his clients would ultimately prevail on the merits of the case.

For Boston employment attorney David I. Brody, *Brzuchalski* shows that courts will not “disaggregate” conduct that may not be unlawful on its own when assessing hostile work environment and disparate treatment claims.

The company’s big mistake, according to Brody, was in not acting sooner.

“Unfortunately, HR mishandled this very early on, and it became harder and harder for the company to address the problem,” he said.

Whitney

> *The plaintiff's attorney said Brzuchalski offers a reminder that employers need not tolerate what in other contexts might be legitimate political expression. "There are no First Amendment rights in a private workplace," said Mark M. Whitney of Marblehead.*

Management-side employment attorney Christopher S. Feudo said the case "screams for the importance" of retaining independent outside counsel to investigate allegations of a hostile work environment. Especially in small offices, it can be hard for company officials to be impartial, he noted.

Southborough attorney Michelle M.M. De Oliveira agreed that "the need to thoroughly investigate reports of discrimination and implement remedial action cannot be emphasized enough."

She noted that the plaintiff had made at least five reports of discrimination in a two-year period and that the employer's only response was to conduct a highly flawed investigation.

Feudo added that the case also serves as a reminder that an employee does not have to make an overtly racist, anti-Semitic or xenophobic comment to contribute to an unlawful hostile work environment.

Feudo said he suspects the courts are beginning to see a proliferation of cases in which they must sort out the impact of employees engaging in workplace speech that some of their colleagues may find incendiary, whether it is wearing a "MAGA hat" or a Black Lives Matter pin.

Here, there may have been a wealth of additional evidence, but in future cases, attorneys will argue that the motivations of actors can be inferred from their public support of certain political movements, which could be a challenge, he said.

TARGET FROM THE START

Plaintiff Joshua Brzuchalski "proudly" wears a star of David necklace and routinely took time off from work at Digital Guardian to observe Jewish holidays, according to the court record.

Throughout his two-plus years working for the Waltham software company, Brzuchalski alleges that a group of co-workers tormented him. He claims the ringleader was Greg Cranley, who openly displayed a red "Make America Great Again" hat, a poster of former President Donald J. Trump, and a "Don't Tread on Me" flag in his cubicle.

Brzuchalski claims that Cranley and two like-minded employees, Jason Wallace and Howie Burton, were not shy about expressing their support for views Brzuchalski connected to the "MAGA movement," including a lack of tolerance for Jews, Black Lives Matter supporters, immigrants and diversity in the United States.

Within his first three weeks of working at DG, Brzuchalski began to sense animosity coming from Cranley in particular. Cranley allegedly told his work group's only other Jewish employee at the time, Jeremy McNair, "I just don't like his kind. I know his type. I don't trust him, and he is shifty."

After a number of other disruptive, offensive and racially insensitive conversations among the individual defendants, Brzuchalski says he was moved to complain to his supervisor after Cranley allegedly stood up in January 2016 and announced his dislike for "people that claim to have American Indian in them just to get a government handout."

Brzuchalski says that the only result of that initial complaint was that Cranley and the other defendants began engaging in acts of physical intimidation.

In November 2016, Wallace and Burton allegedly loudly discussed their mutual belief that Mel Gibson had been "railroaded by the cops" in a highly publicized incident involving the actor's racist and anti-Semitic rant. Brzuchals-

Brzuchalski v. Digital Guard, LLC, et al.

THE ISSUE: Can harassing and offensive actions not clearly directed at a plaintiff's religion be considered when assessing whether hostile work environment and disparate treatment claims should be dismissed?

DECISION: Yes, if coupled with more overtly discriminatory conduct (Superior Court)

LAWYERS: Mark M. Whitney of Whitney Law Group, Marblehead (plaintiff)
James M. Nicholas, Sara Higgins and Paul G. King Jr., of Foley & Lardner, Boston (defense)

ki says that is when he first realized that the defendants were targeting him and McNair because they are Jewish.

On March 10, 2017, Brzuchalski responded to an investigation of an incident between McNair and Cranley by telling the HR representative that he had experienced the same type of hostility from Cranley. But not only was no action taken, McNair's employment was terminated soon thereafter, Brzuchalski claims.

After his third complaint to HR about the harassment he continued to experience, Brzuchalski received permission to work from home. But that permission proved to be short lived.

Contacted by the company's outside counsel who was investigating his allegations, Brzuchalski strongly encouraged her to interview McNair. But Brzuchalski said he would later be shocked to learn that not only had the investigation found no evidence of discrimination, outside counsel had never interviewed McNair.

Ordered back into the office, Brzuchalski found his workspace relocated to a room the size of a "very small closet," away from his colleagues on the sales floor.

A week later, he was asked to meet with the company's general counsel and another manager, who suggested that he was not happy at the company and should accept a severance package, according to his complaint.

On Feb. 12, 2018, Brzuchalski submitted a charge of discrimination to the Massachusetts Commission Against Discrimination and the Equal Employment Opportunity Commission.

Four days later, he emailed DG's general counsel to inform him about the complaint. While he expressed his desire to stay with the company, Brzuchalski also countered the severance package the company had offered him, accounting for commissions on certain accounts he allegedly had originated as an inside sales representative.

On Feb. 20, 2018, Brzuchalski said he was told in a meeting to clean out his desk and leave the premises and await a severance package with some of the terms he requested.

In the ensuing negotiations, the commissions remained a sticking point, and the company terminated him on Feb. 28, 2018.

Brzuchalski believes the company still owes him commissions on several accounts that were in the final stages of procurement at the time of his termination.

He filed suit in Middlesex Superior Court against DG, Cranley, Wallace and Burton on Feb. 19, 2021.

OTHER CLAIMS ALSO SURVIVE

In addition to denying the defendants' motion to dismiss Brzuchalski's discrimination claims under G.L.c. 151B, Barry-Smith declined to dismiss his claims under the Wage Act, which include a claim for the unpaid commissions and for wage retaliation.

With respect to the claim for unpaid commissions, the defendants argued that Brzuchalski had filed his case after the three-year statute of limitations under G.L.c. 149, §150, had expired.

But Barry-Smith noted that, under DG's compensation plan, commission payments are not due to the employee until the company receives payment from the customer.

What Brzuchalski was negotiating over on Feb. 16, 2018, was what he expected to earn soon, which the judge noted "does not control the statute of limitations analysis."

Instead, Brzuchalski had made by nine days the deadline to file claims related to commissions allegedly due and payable on Feb. 28, 2018, Barry-Smith found.

As for the wage retaliation claim, Barry-Smith noted that Brzuchalski is "entitled to an inference of causation" that his insistence that he be paid those commissions was a "determinative factor" in his termination.

Barry-Smith also did not dismiss Brzuchalski's claims of intentional and negligent interference with an advantageous business relationship against the individual defendants.

Cranley, Wallace and Burton contended that to succeed on the intentional interference claim, Brzuchalski must also meet the heightened requirement of showing "actual malice."

But Barry-Smith agreed with Brzuchalski that such a showing is required only when the claim of interference is asserted against "corporate officials" acting within the scope of their official duties, and not against mere co-workers.

By alleging that the defendants, motivated by discrimination, had induced DG to break Brzuchalski's advantageous relationship with his employer, the plaintiff had supported his claims, the judge decided.

Barry-Smith also found "unavailing" the defendants' argument that, as "employee agents" of DG, they could not interfere with their own contract.

"The three co-workers cannot be said to be parties to the employment agreement between Brzuchalski and DG," the judge wrote.