U.S. Department of Labor

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United States Court of Appeals
for the Fifth Circuit
600 Camp Street
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Attn: Valerie L. Bellanger
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Re: Williams v. Administrative Review Bd.
No. 03-60028 (to be argued March 1, 2004)

Dear Ms. Bellanger:

As directed by the oral argument panel, counsel for the Administrative Review Board submits this letter brief to address the following question:

> If this court determines that it should follow the decisions by the 10th and 11th Circuits in Trimmer v. U.S. Dept of Labor, 174 F.3d 1098 (10th Cir. 1999), and Stone and Webster Engineering Corp. v. Herman, 115 F.3d 1568 (11th Cir. 1997), should liability be imposed on the employer under 42 U.S.C. § 5851(b)(3)(C) and (D) based on the Board's conclusion that "the animosity toward the complainants would not have reached an abusive level in the absence of their protected activities." See ARB Decision and Order, page 51, n. 28.

As we discuss below, the answer is no: liability should not be imposed on the employer if the Court follows Trimmer and Stone & Webster because those decisions are consistent with the Board's decision not to impose liability in this case. Trimmer and Stone & Webster apply the causation rules in 42 U.S.C. 5851(b)(3)(C) and (D) in determining whether an employer took adverse action against a complainant because of the complainant's protected activities. The Board considered those rules in determining whether the employer's actions here were

related to petitioners' protected activities. ER 639 n.28 (ARB Decision and Order (ARB D&O) 51 n.28). The Board's conclusion -- that the employer failed to show lack of causation -- does not resolve the question of employer liability, however, because this case, unlike Trimmer and Stone & Webster, involves a hostile work environment. In a hostile work environment case, an employer has an additional defense to liability (besides lack of causation) that is determined under either a negligence standard (as the Board concluded) or under the Ellerth/Faragher vicarious liability standard imported from Title VII (as petitioners argue). As discussed in the Secretary's brief, the Board properly concluded that under either standard, the employer is not liable for the hostile work environment in this case. Nothing in the Board's decision, or in Trimmer or Stone & Webster, requires a different conclusion.

A. The Board properly applied 42 U.S.C. 5851(b)(3)(C) and (D) in determining the cause of the hostile work environment, not in determining the employer's ultimate liability

1. The Board's reasoning

The petitioners in this case claim that their employer subjected them to a hostile work environment in retaliation for activities protected by Section 211 of the Energy Reorganization Act (ERA), 42 U.S.C. 5851. ER 589 (ARB D&O 1). In resolving that claim, the Board considered two separate questions: (1) whether petitioners established the existence of a hostile work environment, and (2) whether petitioners established that their employer is liable for the hostile work environment. ER 597 (ARB D&O 9).

In determining that petitioners established a hostile work environment, the Board reasoned that the ERA's prohibition against discrimination with respect to the "terms, conditions, or privileges of employment," 42 U.S.C. 5851(a)(1), has been construed to prohibit retaliatory harassment that creates a hostile work environment. ER 600 (ARB D&O 12); see, e.g., English v. Whitfield, 858 F.2d 957, 963-964 (4th Cir. 1988). The elements of such a claim are proof by a complainant (1) that he engaged in protected activity, (2) that he suffered intentional harassment related to that activity, (3) that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment, and (4) the harassment would have detrimentally affected a reasonable person and detrimentally affected the complainant. ER 600-601 (ARB D&O 12-13). The Board concluded

that petitioners established these elements through incidents of harassment by co-workers and low-level supervisors. ER 601-639 (ARB D&O 13-51).

At the end of its discussion of the hostile work environment issue, the Board noted that the employer could have avoided liability under 42 U.S.C. 5851(b)(3)(C) and (D) by establishing by clear and convincing evidence that petitioners would have experienced the same level of hostility even if they had not engaged in protected activity. ER 639 n.28 (ARB D&O 51 n.28). That provision presents a "dual, or mixed motive paradigm," the Board explained. Ibid.; see 42 U.S.C. 5851(b)(3)(C) (Secretary may determine that an ERA violation occurred only if protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint"); 42 U.S.C. 5851(b)(3)(D) (relief may not be ordered if employer "demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such [protected] behavior"). The Board concluded, however, "that the animosity toward [petitioners] would not have reached an abusive level in the absence of their protected activities." ER 639 n.28 (ARB D&O 51 n.28).

Having determined that a hostile work environment existed, the Board then held that the employer was not liable for that environment. ER 639-655 (ARB D&O 51-67). The Board reached this conclusion by applying a negligence standard, under which an employer is liable for a hostile working environment caused by a supervisor when the employer had notice of the harassment and failed to respond adequately. ER 640-643 (ARB D&O 52-55); see Varnadore v. Oak Ridge Nat'l Lab., No. 92-CAA-2, 1996 WL 363346, at *31 (ARB June 14, 1996), aff'd on other issues sub nom. Varnadore v. Secretary of Labor, 141 F.3d 625 (6th Cir. 1998). The Board also concluded that the employer was not liable under the vicarious liability standard that petitioners sought to import from Title VII sexual harassment cases. ER 644-655 (ARB D&O 56-67).

2. The Board's reasoning is correct

The Board properly applied 42 U.S.C. 5851(b)(3)(C) and (D) in determining that petitioners established a hostile working environment. The ERA prohibits discrimination "because" an employee has engaged in protected activity. 42 U.S.C. 5851(a)(1). Sections 5851(b)(3)(C) and (D) set rules for determining when discrimination is "because" of protected activity to replace earlier rules that courts applied in dual

motive cases. See 138 Cong. Rec. 32,081, 32,082 (1992) (statement of Rep. Miller) (lowered burden of proof before ARB to facilitate relief for employees who have been retaliated against); id. at 32,116-32,117 (statement of Rep. Ford) (same); Stone & Webster Eng'g Corp. v. Herman, 115 F.3d at 1572 (citing Mackowiak v. University Nuclear Sys. Inc., 735 F.2d 1159, 1164 (9th Cir. 1984)). One of the elements of a hostile work environment claim is proof that harassment is "because" of protected activity. See ER 601 (ARB D&O 13) (requiring proof that a complainant "suffered intentional harassment related to [protected] activity"). Accordingly, the Board properly considered the causation rules in 42 U.S.C. 5851(b)(3)(C) and (D) in determining whether petitioners established the elements of a hostile work environment claim. Its conclusion "that the animosity toward [petitioners] would not have reached an abusive level in the absence of their protected activities," ER 639 n.28 (ARB D&O 51 n.28), fully supported its finding of a hostile work environment due to discrimination in this case.

The finding of a hostile work environment, however, is insufficient to establish employer liability. The Board thus also properly concluded that an employer's failure to disprove causation under 42 U.S.C. 5851(b)(3)(C) and (D) does not result in employer liability for supervisory and co-worker harassment. As under Title VII, the ERA prohibits discrimination by an "employer," 42 U.S.C. 5851(a)(1), which raises a question whether acts by a supervisor or a co-worker should be attributed to an "employer." Title VII's definition of "employer" provides a defense to employer liability when acts by a supervisor or a co-worker create a hostile work environment, but not when they result in a tangible adverse employment action. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754 (1998) (supervisor harassment); Faragher v. City of Boca Raton, 524 U.S. 775, 791 (1998) (same); Waymire v. Harris County, 86 F.3d 424, 428-429 (5th Cir. 1996) (co-worker harassment).[1] That defense exists

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[1] Because Title VII's definition of "employer" means a person engaged in commerce with a certain number of employees "and any agent of such a person," 42 U.S.C. 2000e(b), courts look to the common law of agency to determine when sexual harassment prohibited by Title VII is attributable to the employer. Ellerth, 524 U.S. at 754; Faragher, 524 U.S. at 791-792. The ERA's definition of "employer" is less expansive than Title VII's and does not include agents. See 42 U.S.C. 5851(a)(2) (definition includes certain licensees and contractors). Accordingly, the Board was not required to look to agency

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even though Title VII, like the ERA, provides specific rules for determining when an adverse employment action is caused by prohibited discrimination. See 42 U.S.C. 2000e-2(m) (unlawful employment practice established "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice"); 42 U.S.C. 2000e-5(g)(2)(B) (employer may avoid liability for damages by demonstrating that it "would have taken the same action in the absence of the impermissible motivating factor"); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). Thus, under either a vicarious liability (Faragher/Ellerth) standard imported from Title VII, as petitioners urge, or a negligence standard, as the Board held and we urge, an employer may assert a defense to an ERA hostile work environment claim that, if successful, will absolve it of liability. The Board's finding that there was "animosity . . . [that] reached an abusive level," ER 639 n.28 (ARB D&O 51 n.28), helps resolve the question whether a hostile work environment existed, but not the ultimate question whether the employer's defense fails and liability thus falls on the employer.

B. The Board's decision is consistent with Trimmer and Stone & Webster

In Trimmer, 174 F.3d at 1102-1104, the Tenth Circuit applied the burden of proof rules in 42 U.S.C. 5851(b)(3)(C) and (D) in affirming the Board's conclusion that an employee failed to establish a necessary element of his case, adverse action by the employer. In Stone & Webster Engineering Corp. v. Herman, 115 F.3d at 1572-1576, the Eleventh Circuit applied those rules in affirming a determination by the Secretary of Labor that an

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principles developed under Title VII in determining the scope of employer liability for supervisory or co-worker harassment under the ERA. Cf. English, 858 F.2d at 964 (Title VII principles apply in determining whether harassment amounts to discrimination in any "terms, conditions, or privileges of employment" under the ERA, 42 U.S.C. 5851(a)(1), because "Congress has used exactly the same language [in 42 U.S.C. 2000e-2(a)(1)] to define the nature and range of the prohibited discrimination").

employer violated the ERA.[2] Trimmer and Stone & Webster are consistent with the Board's decision in this case because neither Trimmer nor Stone & Webster presented a question of employer liability for a hostile work environment. Instead, they presented questions of employer liability for alleged tangible employment actions. An employer may be liable for such actions without any inquiry into whether the actions should be attributed to the employer. See Ellerth, 524 U.S. at 762 ("a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer").

In particular, the employee in Trimmer claimed that his employer wrongfully delayed an alternative placement process because he engaged in activity protected by the ERA. 174 F.3d at 1099. The issue presented was whether this delay was an unfavorable personnel decision, as required for the complainant to establish an ERA violation under the ERA's burden of proof rules. Id. at 1101-1102; see 42 U.S.C. 5851(b)(3)(C) (complainant must prove that protected activity was a contributing factor in an "unfavorable personnel action"). The Board concluded that the delay did not constitute an unfavorable personnel action, and the Tenth Circuit agreed. 174 F.3d at 1102-1104. Neither the Board nor the Tenth Circuit had any occasion to consider burdens of proof or employer liability when the alleged discrimination involved a hostile work environment. Since the question at issue in Trimmer is not at issue here, Trimmer has no bearing on this case and does not support reversing the Board on the question of employer liability that is presented.

In Stone & Webster, an employer demoted an employee and transferred him to a job involving "less prestigious, less essential tasks." 115 F.3d at 1571. The Secretary concluded that the demotion and transfer violated the ERA. Ibid. The Eleventh Circuit affirmed the Secretary's decision, reasoning that the complainant established that he experienced adverse action motivated at least in part by his protected activities, as required by 42 U.S.C. 5851(b)(3)(C), and the employer failed to prove by clear and convincing evidence that it would have demoted and transferred the employee for legitimate reasons, despite the impermissible one, as required by 42 U.S.C. 5851(b)(3)(D). 115 F.3d at 1572-1576.

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[2] The Secretary issued final decisions under the ERA before delegating that responsibility to the Board. See 67 Fed. Reg. 64,272 (Oct. 17, 2002); 61 Fed. Reg. 19,978 (1996).

Stone & Webster is consistent with the Board's decision here because the demotion and transfer to a less favorable job in Stone & Webster amounted to a tangible employment action that is attributable to the employer. See Ellerth, 524 U.S. at 761 ("[a] tangible employment action constitutes a significant change in employment status," including "reassignment with significantly different responsibilities"). The alleged adverse actions at issue in this case were not tangible employment actions, as the Board recognized in distinguishing Stone & Webster, and as the Secretary explained in her brief as respondent. See ER 619 n.16, 631 n.27, 654-658 (ARB D&O 31 n.16, 43 n.27, 66-70); Sec'y Br. 39.

For these reasons, liability should not be imposed on the employer even if the Court follows Trimmer and Stone & Webster.

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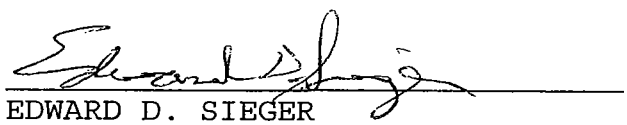

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CERTIFICATE OF SERVICE

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