CLIENT NEWS BRIEF

Ninth Circuit Reverses Summary Judgment, Finding Employer's Response to Discrimination and Harassment Complaints Inadequate

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In *Reynaga v. Roseburg Forest Products* (9th Cir. 2017) 847 F.3d 678, the Ninth Circuit Court of Appeals recently delivered an important opinion regarding public entity employers and what is required for an appropriate response to an employee's complaint of harassment or hostile work environment. In doing so, the Ninth Circuit emphasized that employer liability may exist for negligence, if the employer fails to take effective remedial action in response to such an employee complaint.

In *Reynaga*, plaintiff Efrain Reynaga and his son worked as millwrights for defendant Roseburg Forest Products. The plaintiffs were the only millwrights of Mexican descent. Reynaga alleged that his supervisor, Timothy Branaugh, made repeated and constant racially derogatory statements, such as "we should close the borders to keep mother****ers like you from coming up here," claiming "minorities are taking over the country," and asking "are all Mexican women fat?" Reynaga also alleged that he was treated differently than his Caucasian coworkers on multiple, specific occasions, and retaliated against for filing a written complaint alleging hostile work environment.

Reynaga subsequently submitted a written complaint alleging harassment and discrimination by Branaugh. The employer hired an outside investigator to conduct an investigation into Reynaga's complaint. In the course of the investigation, Reynaga was interviewed and he recounted Branaugh's race-based statements. When the investigator requested a follow-up interview with Reynaga, Reynaga initially stated that he would only participate if he had counsel. Later, Reynaga agreed to participate without counsel, but the employer never followed up. On the basis of the investigation, the employer rearranged Branaugh's schedule so that he would not be on the same shift as Reynaga.

Shortly after the investigation was completed, Branaugh left a printed email in the breakroom containing an article that claimed former President Barack Obama was an illegal alien and that "our borders are like sieves." Reynaga read the email and described feeling "very concerned about the racial hostility and harassment at work."

A few days later, on January 9, 2010, Reynaga and his son arrived at work for their shift. Upon discovering that Branaugh was also on site, Reynaga and his son immediately left the premises. Reynaga's son notified the employer about Branaugh's presence on the same shift and stated, "[w]e will not work in a hostile work environment. We will report to our shift on … Wednesday [January 13]… [u]nless we hear otherwise." On Wednesday, January 13, 2010, when they arrived to work, plaintiffs were asked to meet with the Defendant's human resources manager, Dan Johnson. Johnson told plaintiffs that Branaugh had been directed to have no contact with them absent an emergency. Johnson directed Reynaga and his son to do the same, and asked them if they would complete their shift that day while Branaugh remained on site. Reynaga and his son responded that they would not work with Branaugh. As a result,


Sloan R. Simmons
Partner and Co-Chair
Litigation Practice Group
Sacramento Office
ssimmons@lozanosmith.com


Meera H. Bhatt
Associate
Fresno Office
mbhatt@lozanosmith.com

Lozano Smith
ATTORNEYS AT LAW

they were suspended "pending the conclusion of the investigation." Five days later, Reynaga received a letter explaining that he was discharged for walking off the job on January 9, 2010 and refusing to work on January 13, 2010.

Thereafter, based upon these events, Reynaga filed a complaint in the United States District Court alleging claims for: (1) hostile work environment, including employer liability through negligence; (2) disparate treatment with regard to his discharge; and (3) retaliation related to his discharge. While the district court granted summary judgment in the defendant employer's favor, the Ninth Circuit reversed, finding that Reynaga had presented sufficient facts to move forward with these claims.

As to Reynaga's hostile work environment claim, the court held that a factual dispute remained as to whether: (1) the unwelcome race based conduct described above was "sufficiently severe or pervasive to alter the conditions of the Reynaga's employment and create an abusive work environment"; and (2) whether the defendant employer, once apprised of Branaugh's behavior, was liable for the hostile work environment claim through its negligence in failing to take adequate remedial action. The Ninth Circuit thus held that Branaugh's repeated racist comments and Reynaga's statements that he felt physically threatened at work met the "sufficiently severe or pervasive" test.

Significantly, the Ninth Circuit held that a reasonable trier of fact could find Reynaga's employer liable for negligence as to Reynaga's hostile work environment claim. Specifically, a fact finder could conclude that the employer "knew, or should have known, about the harassment, and failed to take prompt and effective remedial action." Reynaga's employer knew of Branaugh's misconduct, however, the employer never formally disciplined Branaugh, despite multiple complaints about his behavior. Instead, the court found that the employer merely "coached" Branaugh with platitudes, such as "I hope you learn from your mistakes. Don't do it again," and "you can make people uncomfortable." The court found this in sharp contrast to firing Reynaga for "walking off" the job and refusing to work with Branaugh. In effect, the defendant employer conditioned Reynaga's continued employment on his willingness to work with a coworker who had a proven history of repeatedly harassing him based on race and national origin.

Additionally, evidence existed that the employer never contacted Reynaga to complete his follow-up interview during the investigation and that it treated Reynaga differently from his Caucasian coworkers. Based on the employer's failure to discipline Branaugh or to implement effective remedial procedures to deter Branaugh's continued harassment, the Ninth Circuit held that a reasonable trier of fact could reasonably find the employer liable for hostile work environment based on its negligence: "[w]hen the employer undertakes no remedy, or where the remedy does not end the current harassment and deter future harassment, liability attaches for both the past harassment and any future harassment."

As to Reynaga's disparate treatment claim, the court held that there was sufficient evidence to give rise to an inference of discrimination based on the employer's treatment of two Caucasian employees, which was more favorable than the employer's treatment of Reynaga. As to Reynaga's retaliation claim, the court determined that he had a "strong" case based on temporal proximity: Reynaga had worked for the employer for over five years but the employer fired him barely one month after making a formal written complaint against Branaugh.

The important takeaway from this case for employers is that it is crucial to promptly and thoroughly investigate an employee's complaint, and to take effective remedial measures to deter future misconduct. Such remedial measures may include avoiding contact between a complainant and the offending party (such as through reassignment, rescheduling shifts, etc.) and issuing disciplinary action sufficient to deter the offending party. Failure to implement effective remedial measures may result in employer liability for a hostile work environment on a theory of negligence.

For more information on the *Reynaga* decision or an employer's duty to respond to employee harassment or hostile work environment complaints, please contact the authors of this Client News Brief or an attorney at one of our nine offices located statewide. You can also visit our website, follow us on Facebook or Twitter or download our Client News Brief App.