

WHY A CRY BABY, A SPOILED CHILD AND A TROUBLE MAKER LOST THEIR DISCRIMINATION CASE

COMPLAIN, COMPLAIN, COMPLAIN...

Two African-American nurses for some time had complained about working conditions, race discrimination and unfair treatment at their hospital. They filed a petition with Human Resources that alleged Filipino nurses were treated better than the African-American nurses. It was investigated but could not be corroborated. They complained that other nurses were sleeping on the job, that their unit was unprofessional and that work assignments were unequal and unfair. They also complained that changes weren't made as they had requested and that they were being constantly ignored, "not listened to" and always got the "cold shoulder" from management. Finally, they claimed "harassment" when one of them was called a "trouble maker," a "cry baby" and a "spoiled child" during a meeting. They each filed race discrimination and retaliation charges with the EEOC and then filed a lawsuit. They lost, and here's why...

UNFAIR, MAYBE...BUT UNFAIR DOES NOT MEAN UNLAWFUL

The lower court granted summary judgment for the hospital, and the Seventh Circuit Court of Appeals agreed and **affirmed** the dismissal of the nurses' claims. In reaching this conclusion, the Court outlined all the weaknesses in the nurses' case. The Court set out a number of basic truths in employment discrimination cases that employers should understand:

- **A plaintiff must show that they were treated differently than "similarly situated" employees outside of their protected class.** These nurses failed to identify any similarly situated employee who was treated any better than they were;
- **There has to be some material adverse action taken by the employer.** In this case, there was none. They weren't fired, laid off, disciplined, denied a promotion or transferred to a lower position. Name calling without more is not adverse action;
- **An action is only adverse if it might dissuade a reasonable worker from making or supporting a charge of discrimination.** Trivial harms like name calling are not legally significant;
- **Personality conflicts at work that generate antipathy and snubbing by supervisors and coworkers are not actionable.** Title VII protects against discrimination, not "personal animosity or juvenile behavior";
- **Even if management criticisms were unfair, there must be evidence that the criticisms were unfair because they were motivated by race or complaints about racial discrimination.** There was no evidence of unlawful motivation in this case by anyone;
- **The fact that someone disagrees with you or declines to take your advice does not, without more, suggest that they discriminated against you.** In this case, there wasn't anything more;
- **Title VII prohibits retaliation for complaints about discrimination, not retaliation for complaints about other workplace issues.** In this case, there were no race-related words used, and there was no link to any race-related comment or complaint.

PROTECTED CONCERTED ACTIVITY UNDER THE NLRA - DIFFERENT LAWS, DIFFERENT PROTECTIONS, DIFFERENT OBLIGATIONS

Employers should not lose sight of the fact that these basic truths only apply in the realm of discrimination and retaliation claims under Title VII, the ADA and the ADEA. Complaints about working conditions, petitions to employers and other "concerted activities" are protected by another entirely different federal law. The NLRA, as we have seen by recent decisions of the NLRB, protects employees in making complaints about wages, hours and working conditions. Private employers need to be very cautious when calling an employee a "trouble maker" or a "cry baby" in connection with their complaints about working conditions. While an employer might dodge a discrimination case, it's comments like those that can get the employer in some real "trouble" with the NLRB.

Reference: *Brown, et al v. Advocate South Suburban Hospital, et al*, (7th Cir. November 21, 2012).

If you have any questions please, contact Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney.