MONAGHAN V. WORLDPAY US, INC.; ELEVENTH CIRCUIT CLARIFIES THE STANDARD FOR TITLE VII RETALIATION CLAIMS

Taylor A. Johnson*

In *Susan Monaghan v. Worldpay US, Inc.*, the Eleventh Circuit reversed a district court's grant of summary judgment in a Title VII retaliation complaint.[1] This decision clarifies the requirements needed for successful Title VII retaliation claims.

Susan Monaghan ("Monaghan") was a 40-year-old white woman who was employed as an executive assistant at Worldpay from September 2, 2014 to November 21, 2014.[2] Tammi Daniel ("Daniel"), an African-American woman who was Monaghan's immediate supervisor, began to make multiple race and age based comments to her within a week of Monaghan's employment.[3] Daniel told Monaghan that she needed a "suntan" in order to work, that she was "too old" to work at Worldpay, and that they did not need "another older executive assistant" there.[4] Monaghan reported Daniel's comments to her supervisors, who informed her to stop reporting Daniel because she "was a black female and Worldpay did not want to get sued."[5]

Upon learning of Monaghan's reports, Daniel called her into a conference room and berated her for around 45 minutes.[6] Daniel told Monaghan that she had "cut her own throat" as a result for filing her complaints.[7] Daniel further told Monaghan that she would be "blackballed" and that she "better watch it" because Daniel and her boyfriend knew where she lived.[8] Again, Monaghan reported these comments to her superiors to no avail.[9]

In mid-November, Ruth Hrubala ("Hrubala") took over for Daniels and began to ignore Monaghan.[10] On November 20, Worldpay terminated

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* Junior Editor, *Cumberland Law Review*; Candidate for Juris Doctor, May 2021, Cumberland School of Law; B.A. History, Auburn University.

[1] Monaghan v. Worldpay US, Inc., No. 17-14333, 2020 WL 1608155 at *6 (11th Cir. 2020).

[2] *Id.* at *1.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Monaghan*, 2020 WL 1608155, at *1.

[8] *Id.*

[9] *Id.*

[10] *Id.* at *2.

Monaghan due to a "lack of confidence, lack of trust, and lack of teamwork."[11] However, Monaghan claimed that Hrubala informed her that she was fired because of her repeated complaints to the executives.[12] As Monaghan was escorted out of the building, she was told that "I need you to understand that today is for Tammi [Daniel]."[13] Monaghan interpreted this comment to mean that Worldpay was retaliating against her because of Daniel's discharge.[14]

The Eleventh Circuit reviewed the district court's summary judgment order *de novo*.[15] The Eleventh Circuit previously held that "Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions."[16] In *Wideman v. Wal-Mart Stores, Inc.*, the Eleventh Circuit concluded that, when viewed collectively, actions such as suspensions, explicit negative comments about the plaintiff, threats to shoot the plaintiff in the head if she called headquarters to complain, and delaying authorized medical treatments for the plaintiff's allergic reaction were sufficient to constitute discrimination.[17] Title VII makes discriminatory treatment "actionable only if it reaches a sufficient level of substantiality. Trivial slights are not actionable."[18] The Eleventh Circuit articulated that "some events are substantial enough standing alone to be actionable."[19] Further, the court described tangible employment actions as "things that affect continued employment or pay—things like terminations, demotions, suspensions without pay, and pay raises or cuts—as well as other things that are similarly significant standing alone."[20] Additionally, the Eleventh Circuit noted that

> mistreatment based on race or other prohibited characteristics, including subjection to adverse conditions, is actionable even if the mistreatment does not rise to the level of a tangible employment action, but only if the mistreatment is

[11] *Id.*
[12] *Id.*
[13] *Monaghan*, 2020 WL 1608155, at *2.
[14] *Id.*
[15] *Id*.
[16] *Id*. at *3 (Quoting Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1455, 1456 (11th Cir. 1998)) (internal quotation marks omitted).
[17] *Id*.
[18] *Id*. (Citing Oncale v. Sundown Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (noting that Title VII is not a general civility code)).
[19] *Monaghan*, 2020 WL 1608155, at *2.
[20] *Id.* at *3.

> "sufficiently severe or pervasive" that it can be said to alter the terms, conditions, or privileges of employment.[21]

Finally, the Eleventh Circuit held that "mistreatment based on retaliation for protected conduct is actionable whether or not the mistreatment rises to the level of a tangible employment action, but only if the mistreatment 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" [22] This standard provides a broader form of protection for employees.[23] Furthermore, this retaliation standard "is not limited to discrimination with respect to compensation, terms, conditions, or privileges of employment." [24] Therefore, this standard is satisfied if an action "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[25] The Eleventh Circuit has repeatedly followed the "well might have dissuaded" standard.[26] Additionally, every other circuit has adopted this standard for retaliation claims.[27]

The Eleventh Circuit ultimately held that Daniel's comments to Monaghan "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[28] Furthermore, the court noted that Monaghan's actual termination could satisfy the "well might have dissuaded standard" because "a reasonable jury could find that the termination was retaliatory."[29] Likewise, the fact that Monaghan was told "this is for Tammi [Daniel]" as she was escorted from the building supports an inference that her firing was retaliatory.[30] Thus, the Eleventh Circuit

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[21] *Id.* at *4 (citing Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).
[22] *Id.* (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).
[23] *Id.*
[24] *Id.*
[25] *Monaghan*, 2020 WL 1608155, at *4 (quoting Crawford v. Carroll, 529 F.3d 961, 974 (11th Cir. 2008)) (internal quotation marks omitted).
[26] *Id. See* Crawford v. Carroll, 529 F.3d 961, 974 (11th Cir. 2008); Alvarez v. Royal Atl. Developers, Inc., 610 F.3d 1253, 1268 (11th Cir. 2010).
[27] *Monaghan*, 2020 WL 1608155, at *4 (citing Billings v. Town of Grafton, 515 F.3d 39, 52–53 (1st Cir. 2008); Kessler v. Westchester Cty. Dep't of Soc. Servs., 461 F.3d 199, 207–08 (2d Cir. 2006); Moore v. City of Phila., 461 F.3d 331, 341 (3d Cir. 2006); Hoyle v. Freightliner, LLC, 650 F.3d 321, 337 (4th Cir. 2011); Aryain v. Wal-Mart Stores Tex. LP, 534 F.3d 473, 484 n.9 (5th Cir. 2008); Michael v. Caterpillar Fin. Servs. Corp., 496 F.3d 584, 593–96 (6th Cir. 2007); Szymanski v. Cty. of Cook, 468 F.3d 1027, 1029 (7th Cir. 2006); Clegg v. Ark. Dep't of Educ., 892 F.3d 1005, 1021 (9th Cir. 2018); Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079, 1083, 1086–87, 1090 (10th Cir. 2007); Velikonja v. Gonzales, 466 F.3d 122, 124 (D.C. Cir. 2006)).
[28] *Id.* at *5.
[29] *Id.*
[30] *Id.*

found that this issue should have been presented to a jury rather than awarded as a summary judgment for the defendant.[31]

Circuit Judge Tjoflat concurred in part and dissented in part to the court's holding.[32] Judge Tjoflat agreed that the district court's order should be reversed and that the case should have been presented to a jury.[33] However, he disagreed with the majority's view that Monaghan's separate retaliatory claims under the Age Discrimination in Employment Act (ADEA) and 42 U.S.C. § 1981, which the district court had ruled on,[34] could not be considered by the Eleventh Circuit because they were not properly pled in her original complaint.[35] Although the court's rules typically preclude considering amendments to a complaint in a memorandum filed in opposition to a motion for summary judgment, Judge Tjoflat suggested the rule did not apply here because Worldpay "went along" with Monaghan's amendments and effectively consenting to them.[36]

Judge Tjoflat noted that Worldpay responded to Monaghan's complaint raising affirmative defenses to all her claims related to age and race alike.[37] In her response to defendant's motion for summary judgment, Monaghan stated she was not moving forward with a hostile work environment claim but only her retaliation claims against Worldpay and Daniel under Title VII, 42 U.S.C. § 1981, and ADEA.[38] In a reply brief Worldplay argued that Monaghan's retaliation claim based on Daniel's conduct was not properly before the district court because it was not presented in her original complaint.[39] However, the Magistrate Judge did not address Worldpay's argument and assumed the claim was properly before the court.[40]

Ultimately, Judge Tjoflat concluded that the Eleventh Circuit should have considered all the claims in Monaghan's complaint because

> [t]his is the way the case was litigated in the District Court. At the end of the day, the question for the District Court was pure and simple: whether the evidence adduced during discovery

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[31] *Id.* at *6.
[32] *Id.* at *6 (Tjoflat, J., concurring in part and dissenting in part).
[33] *Monaghan*, 2020 WL 1608155, at *6 (Tjoflat, J., concurring in part and dissenting in part).
[34] *Id.* at *2.
[35] *Id.* at *6 (Tjoflat, J., concurring in part and dissenting in part).
[36] *Id.* (Tjoflat, J., concurring in part and dissenting in part).
[37] *Id.* at *7. (Tjoflat, J., concurring in part and dissenting in part).
[38] *Id.* (Tjoflat, J., concurring in part and dissenting in part).
[39] *Monaghan*, 2020 WL 1608155, at *7. (Tjoflat, J., concurring in part and dissenting in part).
[40] *Id.* (Tjoflat, J., concurring in part and dissenting in part).

> was sufficient to create a material issue of fact on claims of retaliation asserted under Title VII, 42 U.S.C. § 1981, and the ADEA. [41]

For Judge Tjoflat, it was sufficient that Monaghan presented the issues in her Opposition Memorandum and that the District Court addressed them.[42] "The complaint's claims, though legally insufficient as pled, become sufficient after the defendant moves for summary judgment."[43] Thus, the dissenting portion of Judge Tjoflat's opinion would have permitted a review of Monaghan's claim of retaliation under ADEA.

In this case, it was ultimately not controlling for Monahan that her retaliation claim under ADEA was rejected by the Eleventh Circuit, as they found in her favor on her initial claims of retaliation under Title VII. The position taken by the dissent leaves open whether future cases, that do not have a separate avenue of relief under Title VII, might possibly be entertained by the court in the event the defendant fails to properly note the need to reject the plaintiff's amended complaint of additional claims at the time of their amendment. Therefore, litigators would do well to note all alterations and amendments made at the district court prior to filing any motions for summary judgment to preserve their litigation on appeal.

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[41] *Id.* at *9. (Tjoflat, J., concurring in part and dissenting in part).
[42] *Id.* (Tjoflat, J., concurring in part and dissenting in part).
[43] *Id.* at *10. (Tjoflat, J., concurring in part and dissenting in part).