

EMPLOYMENT LAW UPDATE

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Bergene v. Salt River Project Agr. Imp. and Power Dist.
272 F.3d 1136
C.A.9 (Ariz.), 2001.

Comments by supervisors may defeat summary judgment on retaliation and constructive discharge claims.

By *Jason A. Geller and David Borovsky*

Plaintiff Elizabeth Bergene was employed as a journeyman electrician with defendant Salt River Project (“SRP”). In 1990, Bergene filed a pregnancy discrimination claim against SRP. Some time later, Bergene’s husband, who also worked for SRP, was fired. In 1994, Bergene and her husband filed another lawsuit alleging that SRP’s firing of Bergene’s husband was unlawful retaliation for Bergene’s earlier pregnancy discrimination claim.

Beginning in about November 1995, Bergene and SRP began working toward a settlement of the retaliation claim. Bergene continued to work for SRP. During this time, SRP advertised an open position for an electrical foreperson. Bergene met the qualifications for this position and applied for it.

While the settlement negotiations of her earlier claim were pending, her new supervisor greeted her by saying, “Hi,

trouble . . . I’ve heard about you.” In addition, when Bergene briefly served as an acting supervisor, she was repeatedly referred to as “mommy” by other employees. Another supervisor told Bergene that she would not get the foreman position if she held out for too much money in the settlement discussions. Shortly thereafter, SRP changed the requirements for the foreperson position, adding supervisory experience as a factor to be considered. Bergene had very limited supervisory experience and a male employee was selected for the position instead. SRP asserted that the employee selected was better qualified than Bergene.

Six days later, Bergene quit and filed suit against SRP alleging violations of Title VII. Bergene alleged three claims: (1) that she was denied the promotion in retaliation for filing earlier charges of discrimination; (2) that she was denied the promotion because of her sex; and (3) that she was subjected to intolerable

working conditions, which compelled her to resign, amounting to a constructive discharge.

The trial court granted SRP summary judgment on all three claims. On appeal, Bergene argued that she had shown enough evidence to survive summary judgment. The United States Court of Appeals for the Ninth Circuit agreed and reversed.

Retaliation Claim

First, the Court found sufficient evidence showing that SRP's denial of the promotion to Bergene may have been done in retaliation for her filing the earlier retaliation suit. The court cited the few statements of Bergene's supervisors, and the changing of selection criteria for the promotion, as enough to suggest that SRP may have had impermissible motives in denying the promotion. Therefore, the Court found that the evidence provided by Bergene was enough to raise a triable issue of fact as to whether SRP's denial of the promotion was a pretext for retaliation.

Sex Discrimination Claim

Second, the Court found sufficient evidence showing that SRP's denial of the promotion to Bergene may have been motivated by discrimination, rather than legitimate qualifications. The Court referenced the changes in the selection criteria for the promotion, the other employees referring to Bergene as "mommy," and the fact that there were no other female supervisors in the SRP station in which Bergene worked. Thus, the Court found that a triable issue of

fact existed as to whether SRP's reason for denying Bergene the promotion was a pretext for sex discrimination.

Constructive Discharge

To survive summary judgment on this claim, Bergene had to evidence that a reasonable person in her position would have felt that she was forced to quit because of intolerable and discriminatory working conditions. This generally requires a showing of a continuing pattern of discriminatory treatment.

The Court held that Bergene had produced enough evidence to make this showing. The court noted the absence of other female supervisors in Bergene's station, the comments by Bergene's supervisors, and the denial of the promotion. This evidence was enough to raise a triable issue of fact as to whether a reasonable person in Bergene's position would have felt compelled to quit.

This case reminds employers that they must vigilantly guard against retaliation claims. Even if an employee's previous suits or other claims are meritless, employers must counsel their supervisors and employees against making any comments that suggest retaliation. If the plaintiff is able to characterize the employer as retaliatory in general, she may likewise characterize an otherwise lawful employment decision as retaliatory or discriminatory for the purpose of defeating a summary judgment motion.

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