Re-Evaluating the Weight of the "Subtle" Discriminatory Remarks: One Pennsylvania Federal Court Discusses "SUBTLE" SEX DISCRIMINATION IN THE WORKPLACE

Insights
1.31.18

Although sex discrimination claims are often met with explanations that the alleged offender didn't realize what they said or did was offensive, or that the recipient misinterpreted the words or actions of the alleged offender, these types of dismissive explanations are becoming more carefully scrutinized the world of workplace discrimination lawsuits. In *dicta*, the United States District Court for the Middle District of Pennsylvania found that an employer's "subtle" discriminatory comments *could* support an inference of discrimination based on a plaintiff's protected class. The "subtle" comments presented to the court as part of a recent lawsuit included: reference to a woman's "new husband" being able to support her if she was fired; commenting on the distance the woman lived from her job while not knowing if this factor would matter with respect to a male employee; and commenting on a woman's ability to be single and raise four children, again, while admitting to not knowing if this factor would matter with respect to a male employee. See Rosencrans v. Quixote Enterprises, Inc., et al., Case No. 17-CV-00055 (M.D. Pa. January 19, 2018) (J. Conaboy).

Despite the court's *dicta* with respect to these types of harmful remarks, the plaintiff nonetheless failed to support her discrimination claims because these statements were made by the company owner – who was not involved in the decision to terminate the plaintiff's employment. Rather, the decision to terminate the plaintiff's employment was made by two of the plaintiff's supervisors who did not seek or need the approval of the company owner to make firing decisions. This finding highlights the other critical takeaway from this case – it is important to define who the *decision-makers* are and to define what exactly each of those *decision-makers* knew, didn't know, said, or didn't say. Even though the plaintiff in this instance failed to prove her claims, the importance of the court's language with respect to "subtle" discriminatory comments is not lessened.

For those interested in more of the factual and legal underpinnings of the case, the defendant company terminated the plaintiff's employment based on her lateness, playing on her personal computer during work hours, and general poor attitude. The plaintiff brought a Title VII discrimination suit against the defendant company claiming that she was held to a different standard than male employees and that she was fired because she got married. This type of legal theory is known as a "sex-plus" theory – which is a claim of sex discrimination premised on an additional factor such as marital status. To prove a "sex-plus" claim of sex discrimination, a female employee usually must demonstrate that she was treated less favorably than a married male employee. Absent this type of evidence – which was absent in the Rosencrans case – a plaintiff must

employee. Absent this type of evidence – which was absent in the Rosencrans case – a plaintiff must raise an inference of sex discrimination by presenting evidence such as "subtle" discriminatory comments or impermissible sexual stereotyping. The plaintiff was indeed able to prove the existence of these types of factors, however, as noted above, the bad behavior was not attributable to the decision-makers nor did the decision-makers know about it.

Rosencrans is a decision that will be kept on our watch-list. If you have any questions please consult your Fisher Phillips attorney with any questions.