

5th Circuit Rules For the First Time Title VII Can be Extended for a Hostile Work Environment Based on Age and Clarifies What Constitutes Severe or Serious Harassment

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The Fifth Circuit Court of Appeals in a published September 21, 2011, decision held for the first time, following the 6th Circuit, held that Title VII can be extended to address a claim for hostile environment based on age in the case of *Milan Deniol v. Best Chevrolet, Incorporated; Donald Clay*, No. 10-30767, The Court had previously visited the issue on two other occasions but did not choose to extend the hostile work environment to ADEA claims. This time the facts were extremely good. Good facts make for good law.

Dediol, 65 years old and a born again Christian, was employed by Best Chevrolet used car sales department from June 1, 2007, until August 30, 2007. A half-dozen times a day from July 3, 2007, (when he asked for a day off on July 4 to volunteer at his church, and was denied the day off and made to come in earlier than the rest of the workers), Dediol was never again called his given name after being denied the day off. Instead he was called “old mother *****”, “old man”, “pops” and his supervisor Clay would “steal deals from me and direct them to younger sales persons”. After Dediol asked to take a day off to help his church, which was initially granted by another manager, then vetoed by Clay, he was told by Clay “go to your God and God would save your job”; “God would not put food on your plate”; and “Go to your f****ng God and see if he can save your job”. Once he was told by Clay to go out to the lot of the used car department to make sales with Clay saying, “Get your ass out on the floor”. Dediol responded to this instruction by stating he was busy reading the Bible. To this Clay responded to “Get outside and catch a customer. I don’t have anybody in the lot. Go get outside.” Clay also physically threatened him with violence stating Clay was “going to kick Dediol’s ass”, showed Dediol his scars stating Clay “I was shot and was in jail”. Clay then took his shirt off as he said this before charging Dediol in a sales meeting. Clay would charge at him after he found out Dediol asked to be transferred to the new car department to get separated from Clay in the used car department. Upon learning of this Clay vetoed the approved transfer, Clay became violent.

Clay proclaimed in the usual profanities he was going to beat the “F” out of him.

The next day Dediol said the other employees were good people but he could not work under these conditions with Clay. Dediol left work never to return. Dediol was terminated for abandoning his job. On August 22, 2008, Dediol filed suit for hostile work environment based on age, religion harassment and constructive discharge, and state law claims of assault, stemming for the August 29, 2007, charging and threats incident. Best Chevrolet and Clay filed a motion for summary judgment, which the district court granted on July 20, 2010. Dediol appealed timely.

The Court first cited *Rodgers v. EEOC*, 454 F. 2d 234 (5th Cir. 1971) that Title VII has long been a vehicle by which employees may remedy discrimination that creates a hostile work environment. The court discussed two cases that had insufficient facts where the plaintiffs did not satisfy their burden of production, namely *Mitchell v. Snow*, 326 F. App’x 852, 854, (5th Cir. 2009) and *McNealy v. Emerson Elec. Co.*, 121 F. App’x 29, 34 N.1 (5th Cir. 2005). The Court then pointed out the sister circuit, 6th, explicitly applied a claim for hostile work environment was cognizable under the ADEA in *Crawford v. Medina General Hosp.*, 96 F. 3d 830, 834-835 (6th Cir. 1996).

The 5th Circuit then stated, “we now hold a plaintiff’s hostile work environment claim based on age discrimination under ADEA may be advanced in this court.”

The Court carefully analyzed the multiple daily witnessed acts of harassment and insults and found that they met the test of perceived by the plaintiff as hostile and also must appear hostile or abusive to a reasonable person. It was found the incidents interfered with Dediol’s work performance. To overturn the MSJ, it was found the conduct was both objectively and subjectively offensive. Hence the MSJ was overruled on both the age and religion claims of multiple times a day incidents. The Court held “the relationship between the frequency of the comments and their severity created a genuine issue of material fact” precluding summary judgment. Here the Court found “the required level of severity or seriousness varied inversely with the pervasiveness or frequency of the conduct”. Here, half-dozen daily times of remarks supported the actionable claim for age and religious harassment. The comments were all made within the work setting so as to preclude a MSJ. The Court also found the workplace conduct was physically threatening or humiliating. The Court held the issue of interference with work performance was better suited for resolution by a trier of fact.

The Court also upheld the religious discrimination claims due to Clay's "string of remarks" taken together were sufficient. Clay was to have said, "Do you see these shoes? Your God did not buy me these shoes. I bought these shoes", to which Dediol turned the other cheek and just replied, "Okay", and did not press the matter further.

The Court noted "a continuous pattern of much less severe incidents can create an actionable claim," citing *EEOC v. WC&M Enters*, 496 F. 3d 393,399 (5th Cir. 2007).

The Court also reversed the MSJ on the constructive discharge claim based on the "reasonable party in his shoes would have felt compelled to resign" test of *Benningfield v. City of Houston*, 157 F. 3d 369, 378 (5th Cir. 1998). Dediol tried to get in another department and was denied a transfer, leaving him with no choice but to resign.

This was clearly a case with a great set of facts that got the attention of the Court that led to expansion of the law to protect the petitioner and other similar situated age discrimination victims from such abuse in the workplace.

The rate of federal court filings in employment cases is up 9.5% since 2007. The rate of MSJ reversal for unpublished cases nationwide is 19.5%. The rate of MSJ reversals for published cases is 41.4%. Dediol beat the odds. The case shows how screening is important to winning and can make good law. Dediol, like the Biblical Job endured much pain and took the high road despite the constant threats and humiliations he endured six times a day. We all need to work to bring good cases to trial to make good law. Perhaps LAJ or the La. NELA Chapter can start a mentor program to discourage new or inexperienced attorneys from bringing factually weak cases that lead to bad decisions that hurt other plaintiffs. Perhaps even the offer of co-counseling of members should be made available. Such programs have been started in other parts of the country and are very successful. I think judges would appreciate our efforts to do so.