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THE SIXTH CIRCUIT REMINDS US ONCE AGAIN: A WRITTEN ANTI-DISCRIMINATION POLICY DOES NOT BY ITSELF SHIELD AN EMPLOYER FROM PUNITIVE DAMAGES UNDER TITLE VII

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Hubbell v. FedEx SmartPost, Inc. ___F.3d___, 2019 WL 3540796 (6th Cir.) upheld a jury verdict awarding a FedEx parcel sorter $300,000 in punitive damages on her Title VII retaliation claim even though the Court agreed that FedEx had an extensive company-wide anti-discrimination policy in place and annually trained its employees on its policy.

Sheryl Hubbell worked as a lead parcel sorter for FedEx when a new manager, Todd Treman was hired. Hubbell alleged that Treman told her she should accept a demotion from her lead position because "females are better suited to administrative roles and males are better suited to leadership roles." When she refused to step down, she alleged that he repeatedly disciplined her then demoted her based on her sex. She also alleged that FedEx retaliated against her for filing complaints with the EEOC and for filing a lawsuit by unfairly disciplining her, not allowing her to earn extra pay by clocking in early or clocking out late, closely surveilling her and eventually firing her.

The jury rejected Hubbell's discrimination claim but found for Hubbell on her retaliation claim. The jury awarded Hubbell $85,600 in combined front and back pay, $30,000 in non-economic damages, and $403,950 in punitive damages. The district court reduced the punitive damages award from $403,950 to $300,000 (Title VII's cap on punitive damages). FedEx appealed the jury's verdict and Hubbell cross appealed the reduction of her attorney's fees.

The Sixth Circuit upheld the jury's verdict, finding sufficient evidence supporting both the retaliation claim and punitive damages. While this case involved a multitude of procedural, jury and legal issues and the Court's written discussion on those issues is a useful guide to Title VII law, the Court's discussion on punitive damages is especially noteworthy and offers practical take-aways for leaders of companies, board members, and attorneys advising on employment decisions.

The *Hubbell* Court relied upon the three-part test established in *Kolstad v. American Dental Association,* 527 U.S. 526 (1999) for determining when punitive damages can be recovered in Title VII cases. *First*, a plaintiff must "demonstrate that the individuals perpetrating the discrimination acted with malice or reckless indifference toward the plaintiff's federally protected rights." *Second*, a plaintiff must "demonstrate that the employer is liable by establishing that the discriminatory actor worked in a managerial capacity and acted within the scope of his employment." *Third*, the defendant may avoid punitive-damages liability by "showing that it engaged in good-faith efforts to comply with Title VII." *Hubbell*, at 13.

Hubbell presented testimony at trial that she worked from 2006 to 2011 without any write-ups and received awards and promotions. Treman became her manager in March 2011 and later met with her commenting twice about women in management and in January 2012 telling her to demote herself or "things would continue to get harder for [her]." After this meeting, her supervisors took several actions that made her job harder. She received two written disciplines in 2012 and contested the factual basis for both disciplines. She received a poor performance review for 2012 and contested the factual basis for that as well. Hubbell sent an email to the managing director for human resources about her performance review and about Treman's comment. Guy Larsen, a senior manager for human resources was sent to meet with Hubbell. Hubbell told Larsen that Treman was discriminating against her because he "didn't want females in management." Larsen responded that he preferred the term "favoritism" instead of "discrimination" because "discrimination" was an "inflammatory word." Rather than addressing Hubbell's concerns about discrimination, Larsen told her that "maybe [she] just had a bad review, and to keep [her] head down, and let the managers do their job."

Hubbell continued to have trouble, received more disciplines and was demoted. After her demotion, she filed an EEOC complaint and was further disciplined, the first one four days after her complaint. Hubbell filed a second charge with the EEOC and a lawsuit before she was ultimately terminated. Fellow employees testified that she was singled out for adverse treatment and she presented evidence, such as doctor's notes excusing at least some of her absences.

On appeal, FedEx did not dispute that Treman and other managers were acting within the scope of their employment. FedEx instead focused on its "implementation, promulgation, and training regarding anti-discrimination policies" to argue that it did not act egregiously. The Court rejected FedEx's argument that a finding of egregiousness was needed and instructed that the first prong can be satisfied by demonstrating that the individual in question acted "in the face of a perceived risk that its actions will violate federal law." The Court found "the testimony at trial about FedEx's anti-discrimination training itself provides support for the jury's finding that Hubbell's managers acted with malice or reckless disregard toward her federally protected rights." *Hubbell,* at 13. *See New Breed Logistics*, 783 F.3d at 1072. The Court held, "FedEx's arguments about 'its stringent [anti-discrimination] training, policies, and procedures' do not provide a basis to grant it judgment as a matter of law on either of the first two prongs of the *Kolstad* test." *Hubbell,* at 13.

With respect to the third prong, the Court rejected FedEx's argument that it engaged in good faith efforts to comply with Title VII. The Court explained, "it is far from clear that FedEx's anti-discrimination policy was 'extensively implemented.' In this case…, there was significant evidence in the record that 'call[ed] into question FedEx's sincerity to abide by its own written policies.' *Hubbell* at 14. Most notably, Jessica Benjamins, FedEx's corporate Human Resources manager, testified that if an employee had complained to her of gender discrimination, her next step would be to open an investigation. But she had not seen a report of any investigation by FedEx into Hubbell's reports of discrimination and retaliation. Benjamins, FedEx's own witness,

further testified that she did not know if FedEx followed its own policies in this case." *Hubbell* at 14.

FedEx argued that there was an investigation and it was even documented on a FedEx Investigation Report Form. The Court found FedEx's argument "misleading at best," noting: "The investigative report form FedEx refers to does not document an investigation into Hubbell's claim of discrimination. Instead, this form documents that Guy Larsen of Human Resources investigated an allegation of aggressive behavior by a subordinate while Hubbell was still working as a lead parcel sorter, which resulted in that subordinate's termination. The only possible reference to her allegations of sex discrimination is a notation that Larsen 'was visiting with Ms. Hubbell tied to a separate concern that she had with her performance review.' Thus, though it is technically true that Larsen 'documented Hubbell's allegations,' an investigation took place, and an employee was discharged, as FedEx claims, all of that pertains to an unrelated matter. FedEx's description of this document cannot cloak the failure of its Human Resources Department to conduct any investigation into Hubbell's complaint of gender discrimination." *Hubbell*, at 14.

The *Hubbell* Court continued: "Relying on the testimony that any investigation into an EEOC complaint 'would be handled by [FedEx's] legal department,' FedEx also argues that '[i]t is not accurate to say that FedEx never investigated, only that the *HR Department* did not.' This is an implicit concession that FedEx's Human Resources department never investigated Hubbell's claims of gender discrimination. Moreover, FedEx's argument depends on a suggestion that its legal department investigated Hubbell's complaints even though there is no evidence in the record to indicate that *any* FedEx department investigated Hubbell's claims of sex discrimination. Accordingly, a reasonable factfinder could determine that, despite its formal anti-discrimination policy, FedEx did not engage in good-faith efforts to comply with Title VII." *Hubbell*, at 14.

All of the Court's critical rhetoric notwithstanding, it is still not altogether surprising that FedEx's leadership elected to try, rather than settle, this case. Also in the record are facts that support a different scenario: some evidence suggests that Ms. Hubbell is an employee who may have been promoted over her capabilities, had received several disciplines and a poor review, then continued to perform below expectations, causing even more disciplines, filing two complaints with the EEOC and a lawsuit against the company, before she was ultimately terminated for poor performance. However, a more in-depth review of the facts might have revealed a different scenario, one more aligned with the way the jury saw things. For example, had Larsen conducted an investigation when Hubbell sent her first email, or had leadership stepped back and asked why an individual who worked for the company for five years without incident, was suddenly getting disciplined (15 disciplines in 2 ½ years) they might have seen the situation more as the jury did at trial and may have been able to prevent further issues.

An employer's promulgation of an anti-discrimination policy in and of itself will not insulate the employer from punitive damages. The goal of Title VII is not the creation of written policies, but the end of wrongful discrimination in the workplace. That begins with a written policy but also requires effective internal implementation and enforcement of the policy. In the 6th Circuit, punitive damages can be a painful consequence of an employer's failure to heed this guidance. ■

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