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OSHA

OSHA citations barred by statute of limitations

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The Court of Appeals for the Fifth Circuit recently rejected the Department of Labor’s argument that the continuing violations theory should apply to certain non-safety violations.

Background

An energy company purchased an oil refinery over ten years ago. About two and half years after the purchase, the Occupational Safety and Health Administration (OSHA) conducted a four-month inspection of the oil refinery and issued multiple cita-

tions. An Administrative Law Judge affirmed seven citations. The energy company appealed six of the seven citations to the Occupational Safety and Health Review Commission. Four of the citations were affirmed, and the energy company appealed three of the affirmed citations to the Court of Appeals for the Fifth Circuit.

Statute of limitations

The energy company argued that two of the citations, which both have a six-month statute of limita-

see “barred,” page 2

TITLE VII

Sexist remarks and inappropriate materials impermissible in “blue collar” workplace

by [Patricia Kryder](#)
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A female employee worked for a company that manufactures performance fasteners. The majority of the company’s employees work in manual labor jobs. Men comprise 90 percent of the workforce. At the company’s location there were gender-based or sexual materials not related to work, including a flip sign that sat on a refrigerator that included phrases such as “my sexual preference is ... often,” and “I

am not a bitch. I’ve just been in a very, very bad mood ... for the past 30 years.” Other non-employment materials included photographs of women, one with the word “PIG” written across it; a small box containing four small plastic or candy breasts, where the lid read, “Bet you can’t eat just one”; a Penthouse pornographic magazine; and a “pick out” box of bolts with a note on the bolts that stated “Points are not flat (tit).”

see “blue collar,” page 4

from "barred," page 1

tions period, were barred by the statute of limitations. The citations related to compliance audits and a process hazard analysis. Importantly, neither citation mandated that the employer actually remedy the issues or adopt OSHA's recommendations. The energy company asserted that because the analysis and audits took place in 1994, 1998, 1999, 2004 and 2005, they are now barred by the statute of limitations. In opposition, the Secretary of Labor argued that the continuing violations doctrine applied, affectively tolling the limitations period because the violations were never abated so the statute of limitations period never began to run.

In support of its position, the energy company "relie[d] heavily" on a case decided by a different federal appellate court. That decision held that the limitations period begins to run when the violation occurred and if the citation is issued more than six months later, it is time barred. The decision explained that an "occurrence" refers to a discrete event, which is something that happened in the past. The Secretary of Labor's continuing violation argument was inconsistent with this understanding of an "occurrence" because the nature of a continuing violation is that it is not a discrete, past event.

Holding

The court agreed with the energy company. It first explained

that accepting the Secretary of Labor's argument would be at odds with the basic purposes of a statutory limitations period. Specifically, a cause of action must have some statute of limitations; it is clear that lawsuits cannot be brought in perpetuity after the acts in question have occurred. Second, the appellate court explained that if it accepted the Secretary of Labor's theory, OSHA would also have the authority to penalize an employer for failing to timely address and audit findings, even those that arose 20 years ago. However, in this case, the energy company was under no obligation to actually implement any OSHA recommendation and was permitted to justifiably decline to adopt a recommendation. That is very different than a safety regulation that requires an employer to remedy a hazard to prevent workplace injuries. Lastly, accepting the Secretary of Labor's argument would effectively nullify the six-month statute of limitations clearly set forth in the law.

The court explained that just because the continuing violation theory was not applicable to the specific citations at issue, that it did not mean the continuing violations doctrine would not apply in other contexts such as "cases involving continuing, unlawful risks to employee health and safety." The court accordingly vacated the two citations the energy company claimed were time-barred pursuant to the applicable statute of limitations.♦



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HOSTILE WORK ENVIRONMENT

Court finds employee attempt at witness tampering to be fatal

By [Kyle Watlington](#)

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A former employee sued his past employer alleging that they subjected him to discriminatory working conditions, a hostile work environment based on his Hispanic national origin, and subsequently fired him in retaliation for reporting the harassment. The employer wholly denied that any discrimination or retaliation had ever occurred. This denial was supported by the fact that after almost three years into

the litigation the employee and his counsel had been completely unable to locate any witness who could back up the employee's allegations. However, at the last minute, the former employee was suddenly able to locate three other former employees willing to testify and verify the employee's claims.

The three new witnesses appeared at depositions and presented fairly similar stories. Namely, the witnesses testified that they observed a difficult work environment for the employee due to his national origin and witnessed on several occasions hearing a supervisor refer to the employee as a "burro" (Spanish for a small donkey). This testimony strongly supported the former employee's claims.

Three months after these new witnesses testified on the employee's behalf, the employee's attorney received a text message from one of the witnesses asking for a letter "saying what percent I will receive when the case is settled." The employee's attorney promptly informed opposing counsel of this inappropriate message. Additionally, it would later be revealed that on the same day that the witness texted the employee's attorney he also

reached out to the employer and offered to testify on their behalf if he could get his former job back.

The employer's attorney quickly asked the court to hold an evidentiary hearing to determine whether any of the new witnesses provided false testimony. The court agreed, and a hearing was held. At this hearing, the witness in question testified that the employee offered him money in exchange for favorable testimony. As he was financially struggling at the time, he agreed to present the false testimony.

Based on the witness admitting to taking a bribe in exchange for testimony, the trial court dismissed the employee's lawsuit with prejudice. The employee appealed this decision arguing that the record did not show that witness tampering had happened beyond a reasonable doubt. As a result, the employee argued that the trial court abused its authority by dismissing the case.

On appeal, the appellate court upheld the trial court's ruling finding that both the rules of discovery and the court's own authority to manage judicial proceedings allowed the trial court to dismiss the case due to witness tampering. The employer's attorneys were not required to prove that witness tampering had occurred "beyond a reasonable doubt" but instead must only prove that it occurred based on the "preponderance" (i.e. weight) of the evidence provided. The appellate court found the admission of the tampered witness that he accepted a bribe in exchange for false testimony was sufficient to meet this burden. Therefore, the appellate court found that the trial court did not abuse its authority by dismissing the employee's lawsuit, and affirmed the lower court's ruling. ♦

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from "blue collar," page 1

The female worker alleged that her co-workers and managers regularly directed sexist comments toward her. When the female worker asked to switch her job as a machine operator from first shift to third shift to get away from one male co-worker, she became romantically involved with her shift supervisor (whom she had maintained an on-again/off-again relationship with). The Human Resources Department then investigated whether the relationship constituted a violation of the code of conduct prohibiting conflicts of interest. The female worker was allowed to return to work after a ten-day suspension, and was later awarded back pay for the time she missed. The female employee filed a sex discrimination charge with the Equal Employment Opportunity Commission (EEOC), and the EEOC eventually issued a notice of right to sue.

The female filed a lawsuit in a federal court in Pennsylvania. The employer filed a motion for summary judgment. The court found an issue on whether the alleged discrimination was severe or pervasive due to the alleged "culture of sexism" including sexist language, degrading signs, and pornographic images, among other things. For example, the employee has red hair and was allegedly asked by her co-workers if she

was a "firecracker" in bed and if the "carpet" matched the "drapes." She also had a co-worker profess his love while mock-humping a door. The court concluded that the foregoing was enough for a jury to conclude the harassment was severe and pervasive.

There was also evidence that the alleged harassment detrimentally affected the employee, including her testimony that she suffered emotional distress and sought therapy. The record also indicated that she repeatedly complained to Human Resources Department and sought a transfer to avoid a co-worker she believed was staring at her sexually.

In addition, there was a question on whether a reasonable woman in her shoes would have been detrimentally affected by the conduct at issue. Though the employer engaged in what the court called "stereotyping" by arguing that it was a "blue collar" workplace—as if that was an excuse or "pass" for sexist or offensive conduct at work—the court found that just because a workplace might be considered "blue collar" this would not absolve the employer of fostering an environment hostile to females. Thus, the court denied the employer's motion for summary judgment under Title VII and state law. ♦



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