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BY MARTIN FLUMENBAUM AND BRAD S. KARP

Individual Rights: First Amendment Retaliation, Political Asylum

IN THIS MONTH'S column, we report on two recent decisions by the U.S. Court of Appeals for the Second Circuit that purport to expand individual rights. In the first, the court established new guidelines for establishing claims of First Amendment retaliation (*Phillips v. Bowen*[1]); in the second, the court created a new procedural mechanism for evaluating the merits of political asylum applications (*Yang v. McElroy*[2]).

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A. Retaliation Claims

Plaintiff Pamela J. Phillips worked for the Saratoga County Sheriff's Department since 1978, holding several different positions. Ms. Phillips filed a retaliation claim against defendants James Bowen, Saratoga County Sheriff, and M.T. Woodcock, Chief Deputy Sheriff, asserting violations of 42 U.S.C. §§1983 and 1988 for ongoing harassment over a five-year period, allegedly resulting from her support of Mr. Bowen's opponent, Christopher Morrell, in an ill-fated 1993 election campaign, and asserting gender discrimination in violation of Title VII. The district court granted defendants partial summary judgment on Ms. Phillips' retaliation claims — specifically, her claim that she was denied certain economic benefits and opportunities for promotion as punishment for her acts of political speech against Mr. Bowen. In addition, after trial, the jury found for defendants on Ms. Phillips' gender discrimination claims.

The Second Circuit analyzed evidence regarding Ms. Phillips' surviving retaliation claims, for which the jury awarded her $400,000. Examining the issue, the court observed that, "to prove her First Amendment retaliation claim, plaintiff must show that (1) her speech was constitutionally protected; (2) she suffered from an adverse employment action; and (3) her speech was a motivating factor in the adverse employment determination."[3] The challenge for Ms. Phillips was proving the second element ("adverse employment action"). Ms. Phillips' case depended on the jury accepting a "totality of the circumstances" argument, predicated on the gradual accumulation of physical and psychic harms allegedly caused by defendants, since there was no singular event — such as a firing, demotion or pay reduction — to which she could point in seeking relief. Writing for the court, Judge Rosemary S. Pooler observed: "We also have held that lesser actions [other than those listed above] may meet the adversity threshold, but we have not explicitly defined what quantum of lesser actions constitutes an adverse employment action."[4]

In surveying the topography of potentially cognizable "lesser actions," Judge Pooler explained that "[w]e are extremely mindful that a merely discourteous working environment does not rise to the level of First Amendment retaliation. However, we do not believe that is what took place in [*Phillips*'] case." Judge Pooler continued: "Our precedent allows a combination of seemingly minor incidents to form the basis of a constitutional retaliation claim once they reach a critical mass." The court thus ruled that "to prove a claim of First Amendment retaliation in a situation other than the classic examples" listed above — e.g., discharge or refusal to hire, failure to promote or demotion, pay reduction or reprimand — "plaintiff must show that (1) using an objective standard; (2) the total circumstances of her working environment changed to become unreasonably inferior and adverse when compared to a typical or normal, not ideal or model, workplace."[5]

New Test's Possibilities

This new test potentially is significant, for several reasons. The test, depending upon its interpretation by district courts, may well allow more claims to be heard by a jury or, conversely, permit increased disposition on summary judgment based on strict application of the new objective test put in place by the court to assess retaliation. Additionally, *Phillips* puts potential defendants on notice, magnifying the consequence of everyday encounters between employees and employers. As Judge Pooler explained: "Incidents that are relatively minor and infrequent will not meet the standard, but otherwise minor incidents that occur often and over a longer period of time may be actionable if they attain the critical mass of unreasonable inferiority."[6]

The Second Circuit also evaluated the sufficiency of the evidence that Ms. Phillips presented to the jury in support of her retaliation claim. Among the items of evidence Ms. Phillips presented were: (1) proof that Mr. Bowen intimidated her and directed her to stop her political efforts on behalf of Mr. Morrell (his opponent), including Mr. Bowen's query of whether campaigning for Mr. Morrell caused Ms. Phillips to suffer a "guilty conscience"[7]; (2) the fact that Ms. Phillips was forced to wear an incorrectly sized bullet-proof vest; (3) numerous claims that Mr. Bowen verbally abused and berated her after refusing to assist Ms. Phillips in performing her duties; (4) testimony that Ms. Phillips was socially ostracized from her colleagues and peers who Mr. Bowen intimidated in the wake of his victory over Mr. Morrell; and (5) several condescending and public humiliations at the hands of defendants with the result that Ms. Phillips " 'basical-

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ly [became a different person.' "[8] In addition to these pieces of evidence, Ms. Phillips also presented an extensive catalog of psychic and physical harms she experienced as a result of the retaliation. These included her feelings of foolishness and incompetence; a diminished shooting ability, jeopardizing her chances of "pass[ing] firing range certifications, which were required for her to keep her job"; and excessive crying, diarrhea, stomach upset and other stress-related illnesses.

After reviewing the record below, the court found that, "[a]lthough defendants have attempted to minimize and isolate the experiences about which Phillips testified, the jury was entitled to conclude that Phillips adequately described a pattern of nearly constant harassment by her supervisors that took place over a period of several years."[9] Moreover, as Judge Pooler emphasized, the "jury heard the evidence and assessed the witnesses in person and was in the best position to judge the severity of defendants' conduct and the motives for their actions."

Finally, the court determined that the district court's instruction to the jury was proper. Specifically, the district court instructed jurors that, "[t]o prove that harassment constitutes an adverse employment action, plaintiff must demonstrate that the actions allegedly taken by defendants created a working environment unreasonably inferior to what would be considered normal for that position."[10] The district court further cautioned jurors that a "position may become unreasonably inferior if there are repeated and severe incidents of harassment that, taken as a whole, would probably deter an average person from the exercise of their First Amendment rights."[11]

United States District Judge John Martin, sitting by designation, dissented. Citing the Supreme Court's decision in *Connick v. Myers*, Judge Martin wrote that, " '[I]t would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize … employee grievance[s].' "[12] That being said, Judge Martin did "not quarrel with the [legal] standards" outlined by the majority or take issue with the district court's instructions to the jury.

B. Political Asylum

In *Yang v. McElroy*, the Second Circuit broadly interpreted 8 U.S.C. §1105a and granted the petition by a political activist for review of an administrative denial of his application for political asylum.

While studying at Fuzhou University, Chinese citizen Qun Yang organized and led pro-democracy protests, choreographed to coincide with the Tiananmen Square uprising. Mr. Yang shouted slogans, held up signs and collected money to fund student protests at other schools. Mr. Yang's actions produced several consequences: (1) he was discharged from school for refusing to confess during a denouncement meeting held in the spring of 1989; (2) the Public Security Bureau went to his parents' house and ordered him to report to authorities; and (3) Mr. Yang worked under an alias at a private refrigerator factory for over three years and lived in constant fear of government authorities to the point that he never returned to his parents' house and spoke with them from public telephones only once or twice a month. In March 1993, Mr. Yang left China illegally, arriving in the United States in May 1993. He was detained at John F. Kennedy International Airport and given a notice of exclusion, in accordance with the Immigration and Nationality Act, 8 U.S.C. §1182(a) (1994). Mr. Yang requested political asylum in June 1993. In the interim, Mr. Yang joined the Chinese Alliance for Democracy, demonstrated and published articles that criticized the Chinese government.

The Second Circuit granted Mr. Yang's petition for review of the denial by the Board of Immigration Appeals (BIA) of his application for political asylum. The court remanded Mr. Yang's claim to the BIA — while reserving jurisdiction — for the limited purpose of establishing the record as to whether contemporary political and other conditions in China support Mr. Yang's assertion of a well-founded fear of persecution.

New Procedure

The court's ruling is significant not because of the substance of Mr. Yang's claims, but insofar as the Second Circuit has crafted a new procedural mechanism permitting review in these circumstances. First, the court grappled with the issue of timing and delay, which are recurrent problems in asylum cases. As the Seventh Circuit explained in *Asani v. INS*: "Such a mechanism [of remanding and maintaining jurisdiction over the claim as a precaution] is necessary because [w]e continue to be distressed that asylum cases move so sluggishly through the administrative and judicial process that by the time they reach us, the relevant political circumstances may have significantly changed."[13] The chronology of Mr. Yang's case is illustrative; he requested political asylum in 1993; that application was denied by an Immigration Judge in 1994, whose decision the BIA then affirmed in 1998 by relying primarily on a 1993 State Department country report. Furthermore, the Second Circuit's evaluation of the initial 1993 asylum application took place in 2002 — almost 10 years later, after sweeping changes had occurred in the Chinese socio-political landscape. In its per curiam opinion, the court explained: "The recurring problem of the significant time gaps between the operative events, [BIA] determination, and appellate review, has been considered by several circuits but has not yet been fully addressed by the Second Circuit."[14]

Second, by retaining continuing jurisdiction and remanding to the BIA for further factual investigation, the court appropriately balanced the administrative and judicial functions. "This procedure recognizes that the [Immigration Judge] whose decision the [BIA] reviews, unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record."[15]

Finally, by suggesting that, on remand, Mr. Yang seek further review of his asylum application based on changed circumstances in contemporary China, the court has adopted a pragmatic approach to political asylum claims — one that "will enable fuller consideration to be given to the totality of appellant's conduct as it will be perceived by the Chinese authorities if he is returned to their shores."[16]

(1) 278 F.3d 103 (2d Cir. 2002), No. 00-7525, 2002 WL 89394 (2d Cir. Jan. 24, 2002).
(2) 277 F.3d 158 (2d Cir. 2002).
(3) *Phillips*, 2002 WL 89394, at *5.
(4) Id.
(5) Id. at *6.
(6) Id.
(7) Id. at *4.
(8) Id.
(9) Id. at *6.
(10) Id. at *5.
(11) Id.
(12) Id. at *7-8 (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983)) (Martin, J., dissenting).
(13) 154 F.3d 719, 726 (7th Cir. 1998) (quoting *Sivaainkaran v. INS*, 972 F.2d 161, 166 (7th Cir. 1992)).
(14) *Yang*, 277 F.3d at 162.
(15) Id.
(16) Id. at 163.