

Page Printed From:

<https://www.law.com/njlawjournal/2024/03/01/judge-rejects-claims-that-worker-was-fired-for-being-transgender/>NOT FOR REPRINT
NEWS

Judge Rejects Claims That Worker Was Fired for Being Transgender

"The case is now streamlined into, basically, a smaller case, but from our perspective, at least her claim survived—the hostile work environment under federal and state law," plaintiffs attorney David Koller said.

March 01, 2024 at 02:29 PM

Employment Law

Charles Toutant



A Camden, New Jersey, federal judge has dismissed a wrongful-termination claim by a transgender woman who claimed Burlington Stores fired her based on her gender identity.

Senior U.S. District Judge Noel Hillman said the plaintiff, Charlize Cunningham, failed to rebut Burlington's proffered reasons for termination, including frequent lateness and absenteeism.

The judge allowed the case to proceed, however, on Cunningham's claim of a hostile work environment.

Performance Improvement Plan

The case has already had a lengthy history.

After Cunningham was terminated in 2014, she filed a complaint with the U.S. Equal Employment Opportunity Commission, and was granted a right to sue letter in 2018.

Cunningham filed her suit in U.S. District Court in June 2018, and her case was stayed in October 2019 in anticipation of a ruling from the U.S. Supreme Court on whether Title VII of the Civil Rights Act of 1964 protects transgender people from employment discrimination.

After the Supreme Court ruled affirmatively on that question by a 6-3 margin in June 2020, in *Bostock v. Clayton County*, Cunningham's case was reopened in January 2022.

Cunningham, who was hired as a sales associate and later promoted to the job of purchase order coordinator, was placed on a performance improvement plan after failing to meet productivity standards, according to court documents.

The performance improvement plan also included limiting personal phone calls, emails and Internet use during break times as areas to address. Her supervisors also said Cunningham sent memes, jokes and photos of herself to coworkers, and was applying for outside employment during the workday, court documents claimed.

Cunningham worked as a nurse's aide in a nursing home from 11 p.m. until 7 a.m. while working for Burlington, slept between jobs and on breaks, and was late for work on numerous occasions, court papers claimed.

Allegations of Misgendering

In April 2012, Cunningham reported to the human resources department that a co-worker asked her if she was born a man.

Cunningham also reported that supervisors referred to her using male pronouns, and she testified that she was misgendered 30% to 40% of the time, court papers claimed.

Cunningham claims in the suit that supervisors monitored her more closely than other workers, and that she was told to wear pants while other employees were allowed to wear dresses or skirts. She claims she overheard one supervisor, when asked if Cunningham was transgender, respond, “Oh, she’s a pretty one.” She also alleged that she was not invited to participate in a potluck supper that co-workers organized.

Shifting Analysis

On Cunningham’s Title VII claim, Hillman noted that the court applies a burden-shifting analysis that first requires the plaintiff to establish a prima facie case of discrimination.

The burden then shifts to the defendant, to identify a legitimate, non-discriminatory reason for the employment action, he said. If that burden is met, the analysis shifts again to the plaintiff, who must show that the proffered reason for the job action is merely a pretext for intentional discrimination, he said.

Cunningham’s claims about disparate treatment were “insufficient to support her claim, not temporally related to her termination, or based on her own subjective beliefs,” Hillman wrote.

“Even if plaintiff articulated a prima facie case of discrimination, she was terminated for a legitimate, well-documented reason—poor performance, according to defendant, and such reason is not pretextual in light of plaintiff’s undisputed failure to meet line-count requirements and frequent absences and late arrivals,” Hillman wrote.

After Burlington demonstrated legitimate, non-discriminatory reasons for firing Cunningham, she failed to demonstrate that such reasons were pretextual, Hillman said when he granted the company’s motion for summary judgment on the wrongful-determination claim.

Plaintiffs asserting a hostile work environment claim have the burden of demonstrating that the employee suffered intentional discrimination based on his or her protected status, the discrimination was severe or pervasive, the discrimination detrimentally affected the plaintiff, the discrimination would detrimentally affect a reasonable person in like circumstances, and that respondeat superior liability existed, Hillman wrote.

‘Sufficiently Severe and Pervasive’

Burlington claimed that Cunningham cited only a few instances when she was made to feel excluded, and those incidents were not sufficiently severe or frequent to rise to a hostile work environment.

Burlington also asserted that Cunningham provided detailed testimony about alleged discrimination only after being prompted by counsel, which the company likened to “sham affidavits,” according to court papers.

But Hillman rejected that argument.

“[I]t is not for the court to weigh the evidence. Rather, the question is whether a reasonable jury could conclude that the persistent misgendering, inappropriate comments, and a distinct dress code— together—were sufficiently severe and pervasive as to detrimentally affect plaintiff and a reasonable person. The court concludes that a reasonable jury could

so find,” Hillman wrote when he denied Burlington’s motion for summary judgment on the hostile-work environment claim.

‘A Big Victory for Charlize’

Cunningham’s attorney, David Koller of Koller Law in Philadelphia, said he was pleased with the ruling, since workplace discrimination against transgender people wasn’t entitled to protection under Title VII when the was first filed.

“We actually viewed the decision as a big victory for Charlize. The case was challenging from the get go. Burlington was very aggressive in their defense, which obviously is their right, but I’m really happy and proud for Charlize because she stuck with it, despite being met numerous times with feedback that either she should settle or she doesn’t have any claims,” Koller said.

“The case is now streamlined into, basically. a smaller case, but from our perspective, at least her claim survived—the hostile work environment under federal and state law,” Koller added. “And we’re gonna have an opportunity to present it to a to a jury and see how they rule when they’re presented with the evidence that the court noted was sufficient enough to recognize that it could be perceived by a reasonable mind to create a hostile work environment. So we’re excited.”

Chelsea Anne Biemiller and Michael D. O’Mara of Stradley, Ronon, Stevens & Young in Philadelphia, representing Burlington, did not respond to requests for comment about the ruling.

RELATED STORIES

[Judge Wants to Pause NJ Transgender Discrimination Case Until SCOTUS Rules](#)

NOT FOR REPRINT

Copyright © 2024 ALM Global, LLC. All Rights Reserved.