



NUCLEAR EMPLOYER ALERT

Appeals Court Affirms Dismissal of Retaliation Claim by Former Indian Point Security Officer; "Rough and Tumble" Environment Is Expected in Nuclear Security

November 3, 2011

The U.S. Court of Appeals for the Second Circuit on Monday affirmed a trial court's dismissal of a claim by a former security officer at Indian Point. The plaintiff, Tepperwien, alleged that one of his firearms training instructors verbally and physically propositioned and harassed him, in violation of Title VII, and that he was retaliated against for reporting the harassment, including to the NRC and to the Employee Concerns Program (ECP). Tepperwien ultimately resigned and sued for harassment and retaliation/constructive discharge.

A jury ruled in Tepperwien's favor on the retaliation claim. Although the jury awarded no compensatory damages, it awarded him \$500,000 in punitive damages. Entergy Nuclear Operations (ENO) asked the trial court to rule in its favor on that claim, notwithstanding the jury's decision, and the court did so. Tepperwien then appealed to the Second Circuit.

The Court agreed with the trial judge and ENO that Tepperwien could not prevail on his retaliation claim. As a matter of law, according to the Court, Tepperwien had not suffered any "materially adverse" employment action. Addressing seven alleged acts of retaliation, the Court held: (1) fact-finding investigations into Tepperwien's conduct were not materially adverse because they were not a form of discipline and did not lead to disciplinary action against Tepperwien; (2) counseling Tepperwien received was not materially adverse because counseling was not part of the progressive disciplinary process at Indian Point, because counseling is necessary to allow employees to develop, improve, and avoid discipline, and because another employee received similar counseling for the same conduct; plus, the counseling was rescinded; (3) a threat by the security superintendent to walk Tepperwien off site was not materially adverse because it was a heated response to a provocative comment by Tepperwien and was not carried out; (4) a statement by company outside counsel made in connection with an NRC interview of Tepperwien—to the effect that the attorney would ask ENO to

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terminate Tepperwien because Tepperwien repeatedly asked to record the interview after being told he could not—was not materially adverse because the threat was not carried out and Tepperwien was permitted to have his own lawyer participate in the interview; (5) a statement by the security superintendent that he did not like some people while staring at Tepperwien was not materially adverse because it was just a petty slight; (6) the superintendent's giving Tepperwien a false reason for asking him to meet with the NRC (he told Tepperwien he had been randomly selected for an interview, which was not true) was not materially adverse because it involved only the manner in which Tepperwien was invited to the meeting and Tepperwien undoubtedly would have wanted to talk with the NRC anyway; and (7) switching Tepperwien to the night shift was not materially adverse because he had requested the transfer and never objected to it. The Court noted that in his exit questionnaire, Tepperwien wrote that, overall, he was satisfied with his job and would consider working for Entergy again.

The Court went on to state that these actions even in the aggregate were not materially adverse: “Individually the actions were trivial, and placed in context they remain trivial ... Zero plus zero is zero.”

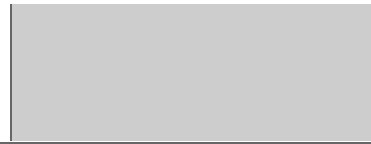
The Court further observed that the employment context—nuclear plant security—was relevant: “The security unit at Indian Point was akin to a law enforcement or quasi-military unit The task of securing a nuclear power plant raised significant safety concerns not found in most work environments, and, understandably, there was little tolerance for mistakes and rule violations, or even perceived mistakes. It is not surprising that Tepperwien was treated in a rough and tumble manner rather than with kid gloves or in genteel fashion.”

The Court also observed that the punitive damages award was improper, not only because Tepperwien had not suffered any materially adverse action, but because the record showed that ENO responded properly to his concerns. Among other things, the Court credited the ECP for meeting with him, listening to his concerns, investigating, and responding to him in writing.

One of the three judges on the panel dissented from the Court's ruling. Among other things, he had a different perspective on the ECP. According to this judge, Tepperwien was “forced” to deal with the ECP as part of an appeal process to get the counseling he received rescinded. This judge portrayed the ECP process in a negative light, noting that the ECP representative advised Tepperwien to consult an attorney before commencing the ECP process, that he “was required” to put “everything in writing,” and that he “had to meet” with the ECP representative. The judge was critical that that process took six weeks. The judge also faulted the other judges for “ignor[ing] the real-world consequences inflicted on Tepperwien immediately after he took his complaint outside of Entergy to the NRC,” including that he “had to” confer with the ECP. Finally, the dissenting judge argued that the fact Tepperwien worked in nuclear plant security was no reason to “dilute” the protections of Title VII.

The case is *Tepperwien v. ENO*, No. 10-1425-CV (2d Cir., Oct. 31, 2011).

If you have any questions regarding this case, or would like a copy of it, please contact us.



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