



## Advocacy for Co-Workers as Basis for Hostile Work Environment Claim

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The Sixth Circuit's decision in *Barrett, Melton, Nickens v Whirlpool Corp*, Case No. 08-5307 focused on hostile work environment and race discrimination claims under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The plaintiffs' claims involved their individual advocacy as co-workers for various minority employees.

### **SPECIFIC EMPLOYMENT LAW RULINGS**

Following previous Sixth Circuit law, the Court confirmed that Title VII forbids discrimination on the basis of association with or advocacy for a protected party. In an attempt to avoid liability, defendant Whirlpool contended that only a significant association, like one that extends outside of the work place, can give rise to an "associational violation" against a white employee. The Court disagreed, and adopted the "sound reasoning" of *Drake v 3M*, 134 F3d 878, 884 (7th Cir 1988), which held that a white employee may sue under Title VII for discrimination against him resulting from his friendship with black co-workers, and not just where a white employee was married to someone of another race, or had bi-racial family members.

The Court held that discriminatory harassment is impermissible whether it is based on (1) the victim's association with protected employees or (2) the victim's advocacy for them. The Court said it would examine the totality of the *circumstances* in analyzing whether the alleged discriminatory conduct unreasonably interfered with an employee's work performance. Only harassment that was directed toward the *plaintiffs themselves or toward others who associated with or advocated* on behalf of African American employees would be relevant to the analysis and only to the extent that plaintiffs were aware of the harassment.

Ultimately, plaintiff Nickens was the only one of the three plaintiff-appellants who was entitled to proceed to trial with her hostile work environment claim (although not a retaliation claim). The other plaintiffs' claims failed because (1) the alleged harassment was not

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sufficiently pervasive or (2) the alleged actions were not based on proven facts. Under the totality of the circumstances analysis, a single comment from a co-worker, a perceived loss of desirable work, and receipt of the “cold shoulder” from a few co-workers was insufficient evidence of a hostile work environment.

**REMINDERS FOR EMPLOYERS**

- This decision serves to remind employers of the importance of maintaining up-to-date employment policies (particularly anti-harassment policies). Failure to halt discriminatory comments in the workplace, even amongst co-workers, may lead to a costly discrimination claim.
- Supervisors at all levels also must be well-trained to recognize and prevent illegal harassment. In this case, the difference between a claim that was sufficient to proceed to trial, and those that were not, rested heavily on the supervisors’ prompt responses to complaints of harassment.