IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-16938

BRENDA BROWN,

Plaintiff-Appellant,

v.

CITY OF TUCSON,

Defendant-Appellee.

On Appeal from the United States District
Court for the District of Arizona

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF THE PLAINTIFF-APPELLANT

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("Commission") is the agency entrusted with the enforcement of the employment provisions of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq. ("ADA"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. ("Title VII"), the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq. ("ADEA"), and the Equal Pay Act, 29 U.S.C. 206(d) ("EPA"). In this case, the plaintiff alleges a violation of the ADA's "interference" provision, 42 U.S.C. 12203(b). Specifically, the plaintiff claims that, after being excused from nighttime duty as an accommodation for her depression, she was subjected to adverse treatment by her supervisor who, unhappy with the accommodation, threatened her with adverse employment consequences. The district court granted summary judgment in the defendant's favor, ruling that an employment-related claim under the ADA's "interference" provision is actionable only if the conduct results in an adverse employment decision of some kind (e.g., a discharge or demotion) or is so severe or pervasive as to meet the standard for a hostile working environment. We believe that the district court has fundamentally misconstrued the ADA's "interference" provision, adopting a standard that will severely limit the protection afforded by that provision. To assist the Court in resolving this important legal issue, the Commission, pursuant to F.R.A.P. 29(a), offers its views as amicus curiae.

STATEMENT OF THE ISSUE

Whether threatening or coercive conduct by an employer must

take the form of an "adverse employment decision" or be sufficiently "severe or pervasive" to meet the standard for a hostile working environment to implicate the protections of the ADA's "interference" provision, 42 U.S.C. 12203(b).

STATEMENT OF THE CASE

This case involves claims of discrimination brought under the ADA. The plaintiff, Brenda Brown, alleges, inter alia, that the defendant, City of Tucson, violated the ADA's "interference" provision, 42 U.S.C. 12203(b), in its capacity as Brown's employer. The district court granted summary judgment in favor of the City.

Brown worked as a detective with the Tucson Police Department. After being diagnosed with depression, she asked for and received the accommodation of being excused from performing nighttime call-out duty. The accommodation was based on "three evaluations which indicated that [Brown's] ability to drive and perform nighttime job related activities may be impaired due to [the] medication" taken for her depression. Order (Aug. 24, 2001) at 3. Shortly after receiving the accommodation, Brown was assigned to a new supervisor. On several occasions, this supervisor "discussed" with Brown "his concern about her inability to perform nighttime call-out duty." Id. The supervisor pestered Brown about the reasons for her accommodation and told Brown that she was "sloughing off." Plaintiff's Statement of Facts at ¶¶ 14-17. The supervisor threatened to have Brown transferred, demoted, or placed on medical retirement if she did not stop taking her medications for a week. Id. Although Brown complained to upper-level management about the

mistreatment, receiving assurances that the matter had been "taken care of," the supervisor persisted. Id. at ¶¶ 18, 20. The supervisor asked Brown if she had come up with a "plan" regarding call-out duty, complained about her hours, and improperly sought access to Brown's departmental medical records by misrepresenting that he had Brown's permission to review the records. Id. at ¶¶ 21-24.

In granting summary judgment on Brown's claim, the district court ruled that the "interference" provision had to be construed in tandem with the ADA's anti-retaliation provision. The court asserted that, to be actionable under the anti-retaliation provision, an employer's conduct must result in an "adverse employment decision" (such as a discharge or demotion) or be sufficiently "'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" Order (Aug. 24, 2001) at 5-6 (quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)). The court opined that this same "general framework" applied to the "interference" provision, meaning that, in the absence of a formal employment decision, threats of the kind involved in this case must be sufficiently severe or pervasive to meet the standard for a hostile working environment. Order (Aug. 24, 2001) at 5-6. Because the conduct in this case was not, in the court's view, sufficiently severe or pervasive to meet the "stringent standard for harassment claims," Brown could not assert a claim under the "interference" provision. Id. at 6.

ARGUMENT

THREATENING OR COERCIVE CONDUCT BY AN EMPLOYER NEED NOT RESULT IN AN ADVERSE EMPLOYMENT DECISION OR BE SUFFICIENTLY SEVERE OR PERVASIVE TO ALTER THE TERMS OR CONDITIONS OF EMPLOYMENT TO TRIGGER THE PROTECTIONS OF THE ADA'S "INTERFERENCE" PROVISION.

The ADA contains a traditional anti-retaliation provision of the kind found in both Title VII and the ADEA. That provision makes it unlawful for a "person" to "discriminate against any individual because such individual has opposed any act or practice made unlawful by this [Act] or because such individual [has participated in a proceeding under the Act]." 42 U.S.C. 12203(a). The ADA also contains a provision not found in either Title VII or the ADEA -- the "interference" provision. That provision makes it unlawful "to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, . . . any right granted or protected by this [Act]." 42 U.S.C. 12203(b). By its plain terms, this provision manifests an intent to protect individuals from threatening or coercive conduct that might tend to interfere with the exercise of rights established under the ADA.

The claim in this case falls squarely within the protection of the "interference" provision. Brown requested and received an accommodation for her depression. This is a right granted under the ADA. In response, Brown's new supervisor threatened to have her transferred, demoted, or placed on medical retirement. He made a number of derogatory comments to Brown, many of which were designed to coerce Brown into giving up her accommodation of not

having to work nighttime call-out duty. Plainly, Brown was being threatened with adverse employment consequences; Brown was being coerced and intimidated. The threatening and coercive conduct occurred as a direct result of Brown having received an accommodation for her depression. This is the paradigmatic case of an employer threatening adverse action in response to an individual "having exercised or enjoyed" a "right granted or protected" by the Act, the very thing that the "interference" provision is designed to prohibit. See, e.g., Lovejoy-Wilson v. Noco Motor Fuel, Inc., 263 F.3d 208, 222-23 (2d Cir. 2001) ("interference" provision implicated by employer's threat to pursue legal action against an employee in response to the employee's request for an accommodation).

In reaching a contrary conclusion, the district court relied upon a two-step interpretive analysis. The court first ruled that the ADA's anti-retaliation provision extends only to conduct that takes the form of an "adverse employment decision" or is otherwise sufficiently "severe or pervasive" to alter the terms or conditions of employment (as in the case of a hostile working environment claim). The court then determined that the "interference" provision had to be construed in the same manner as the anti-retaliation provision; in the absence of a formal employment decision (e.g., a discharge or demotion), threatening or coercive conduct was actionable under the "interference" provision only if the conduct was sufficiently severe or pervasive to alter the terms or conditions of employment.

The court's statutory analysis is legally flawed. To begin with, it is not true that the protections of the ADA's anti-retaliation provision are triggered only by conduct that results in an adverse employment decision or otherwise affects the terms or conditions of employment to a degree sufficient to meet the standard for a hostile working environment claim. The anti-retaliation provision makes it unlawful to "discriminate" against an individual who has engaged in protected activity. It says nothing about an "adverse employment decision" or the "terms or conditions" of "employment." In keeping with the plain terms of the statute, the Commission has interpreted the ADA's anti-retaliation provision (as well as the anti-retaliation provisions of Title VII, the ADEA, and the EPA) as prohibiting "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." EEOC Compliance Manual (BNA), 614:0001, at 614:0005. Although "petty slights and trivial annoyances are not actionable, as they are not likely to deter protected activity," "threats" and other forms of "adverse treatment" are actionable so long as they are "reasonably likely to deter protected activity by that individual or other employees." Id. at 614:0004-06 (stressing that the anti-retaliation provisions, by their plain terms, do not "restrict the actions that can be challenged to those that affect the terms and conditions of employment").

To be sure, some circuit courts have required that retaliatory conduct take the form of an "ultimate employment decision." See,

e.g., Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997); Mattern v. Eastman Kodak Co., 104 F.3d 702, 707-10 (5th Cir. 1997). This Court, however, has explicitly rejected that standard and agreed with the Commission that the protections of the anti-retaliation provisions extend to "'any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.'" Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000) (adopting the position set forth in the Retaliation Section of the EEOC Compliance Manual). In this Court's view, it is not necessary that the retaliatory conduct take the form of an "ultimate employment decision;" nor is it necessary that the conduct "materially affect the terms and conditions of employment." Id. It is enough if the conduct is of the kind "reasonably likely to deter employees from engaging in protected activity." Id. at 1243; see also Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 506 (9th Cir. 2000) (anti-retaliation provision reaches any conduct of a coercive nature that "could have 'a deleterious effect on the exercise of [protected] rights by others'"); Hashimoto v. Dalton, 118 F.3d 671, 675 (9th Cir. 1997) (dissemination of negative job reference sufficiently coercive to implicate the protections of the anti-retaliation provision); Yartzoff v. Thomas, 809 F.2d 1371, 1375-76 (9th Cir. 1987) ("undeserved performance rating" sufficiently coercive to implicate the protections of the anti-retaliation provision); Garcia v. Lawn, 805 F.2d 1400, 1401-02, 1405-06 (9th Cir. 1986) (threatened transfer to an undesirable

location sufficiently coercive to implicate the protections of the anti-retaliation provision); St. John v. Employment Development Dep't, 642 F.2d 273, 274 (9th Cir. 1981) (transfer to "another job of same pay and status" sufficiently coercive to implicate the protections of the anti-retaliation provision).

Further, the cases that have read a more stringent "adverse employment decision" or "terms or conditions" requirement into the anti-retaliation provisions have arisen largely in the Title VII/ADEA context. The rationale for these decisions is that these statutes, in general, address discrimination in the "terms or conditions" of "employment," thus supporting the inference that Congress intended to limit the scope of the anti-retaliation provisions to conduct of a similar nature (despite the absence of the "terms or conditions" language in the anti-retaliation provisions themselves). See, e.g., Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300-01 (3d Cir. 1997). The ADA, however, is not simply an employment statute; it applies as well to public services and public accommodations. The anti-retaliation and "interference" provisions, moreover, are not contained in the ADA's employment title (Title I). They are found in Title V of the Act and apply broadly to all titles of the Act.[1] It is one thing to read an

[1] This distinguishes the ADA from the Civil Rights Act of 1964 (of which Title VII is a part). That Act also contains multiple titles which extend beyond the employment context. Title VII, however, is a self-contained title with its own anti-retaliation provision. It is that feature of Title VII that has led some courts to read the "terms or conditions" language of Title VII's prohibitory provision into the anti-retaliation provision (found in the next section of the same title).

"adverse employment decision" requirement into the anti-retaliation provision where the statute in question is strictly employment-based. It is another thing to do so where the statute is not strictly employment-based and the provisions at issue broadly apply to all titles of the Act, including its non-employment titles.[2] Compare EEOC v. Benicorp Ins. Co., 2000 WL 724004, *3 (S.D. Ind. May 17, 2000) (not proper to import Title VII/ADEA limitations on coverage into the ADA, where the ADA's Title I provisions are more broadly written and the ADA has provisions, such as the "interference" provision, that are not found in either Title VII or the ADEA). The sine qua non of the district court's interpretive edifice -- that the ADA's anti-retaliation provision reaches only "adverse employment decisions" or conduct sufficiently severe or pervasive to alter the employee's working conditions -- is simply wrong.

In any event, even assuming that the ADA's anti-retaliation

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[2] The district court suggested that different standards could be applied to "interference" claims, depending on whether the claims arose under the employment title, the public services title, or the public accommodations title. Order (Aug. 24, 2001) at 6. But this proves too much. The district court's approach would require one set of standards for employment cases, one set of standards for public service cases, and one set of standards for public accommodation cases. These standards, moreover, would have to be established by judicial fiat, since the statute itself makes no such distinction. If Congress wanted to create separate title-specific standards for "interference" claims, it could have done so. Congress, instead, adopted a generic standard that is sufficiently broad to encompass all titles of the Act. The district court's approach would require a substantial rewriting of the statute, with a crazy-quilt of varying standards, none of which appear in the statute itself.

provision is so limited, the "interference" provision is a separate provision, which "arguably sweeps more broadly" than the anti-retaliation provision. Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778, 788-89 (3d Cir. 1998). In enacting the ADA, Congress could have adopted nothing more than the traditional anti-retaliation provision found in the other anti-discrimination statutes enforced by the Commission. Congress went a step further, providing additional protection for those exercising their rights under the Act. On its face, the "interference" provision makes it unlawful to "coerce, intimidate, threaten, or interfere." "Threats" are explicitly referenced in the provision and are actionable when made against an individual "on account of his or her having exercised or enjoyed" a "right granted or protected" by the Act. The "interference" provision cannot be treated as mere surplusage. See Dunn v. CFTC, 519 U.S. 465, 472 (1997) (legislative enactments "should not be construed to render their provisions mere surplusage"). Whatever the limits of the ADA's anti-retaliation provision, the "interference" provision is broad enough to embrace the type of threatening and coercive conduct at issue in this case.[3]

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[3] The real distinction between the anti-retaliation provision and the "interference" provision is that the former protects individuals who have engaged in certain protected activities, while the latter protects individuals who have, in the broader sense, exercised or enjoyed "rights" under the statute. See Bachelder v. America West Airlines, Inc., 259 F.3d 1112, 1124 (9th Cir. 2001) (noting a similar distinction between the anti-retaliation and "interference" provisions of the Family and Medical Leave Act). Arguably, there is no meaningful

Notably, the ADA's interference provision mimics the "interference" provisions in other federal statutes. For example, the National Labor Relations Act ("NLRA") contains a provision making it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by [the Act]." 29 U.S.C. 158(a)(1). This provision has been consistently interpreted as applying to any conduct that "tends to chill an employee's freedom to exercise his [statutory] rights." California Acrylic Indus., Inc. v. NLRB, 150 F.3d 1095, 1099 (9th Cir. 1998); accord Tasty Baking Co. v. NLRB, 254 F.3d 114, 124 (D.C. Cir. 2001) (employer's statement violates the NLRA's "interference" provision if "considering the totality of the circumstances, the statement has a reasonable tendency to coerce or interfere with [statutory] rights"). In particular, the provision reaches threats to take adverse actions against employees for the exercise of their statutory rights. See Tasty Baking Co., 254 F.3d at 124-25 (threats to take reprisals against employees who participated in union activities); NLRB v. Gissel Packing Co., 395 U.S. 575, 616-20 (1969) (threat to shut down plant if employees form a union); NLRB v. Coca-Cola Co. Foods Div., 670 F.2d 84, 85-86 (7th Cir. 1982) (threat to "come after" employee if he discussed his grievance with

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distinction between the kinds of employer conduct reached by the two provisions; both provisions apply broadly to conduct that is reasonably likely to chill individuals from engaging in protected activity or exercising their rights under the statute. That said, whatever the limits of the anti-retaliation provision, the "interference" provision is written in the broadest possible terms, embracing, on its face, any conduct that "coerce[s]," "threaten[s]," "intimidate[s]," or "interfere[s] with."

other employees). Likewise, the Family and Medical Leave Act ("FMLA") contains a provision making it unlawful for an employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" by the Act. 29 U.S.C. 2615(a)(1). That provision has also been read to apply to conduct that "'tends to chill' an employee's willingness to exercise" statutory rights. Bachelder v. America West Airlines, Inc., 259 F.3d 1112, 1124 (9th Cir. 2001). Both of these statutes are employment-based. Both statutes, moreover, contain anti-retaliation provisions similar to the provisions found in the anti-discrimination statutes enforced by the Commission. See 29 U.S.C. 158(a)(4) (NLRA); 29 U.S.C. 2615(a)(2)-(b) (FMLA). Nonetheless, in applying the "interference" provisions of these statutes, courts have not imposed a requirement that the employer's conduct take the form of an "adverse employment decision" or otherwise alter the "terms or conditions" of employment. See, e.g., Bill Johnson's Restaurant, Inc. v. NLRB, 461 U.S. 731, 740-47 (1983) (filing a lawsuit against an employee as an act of reprisal for the exercise of statutory rights implicates the NLRA's "interference" provision); Dorsey Trailers, Inc. v. NLRB, 233 F.3d 831, 838-45 (4th Cir. 2000) (threats to take adverse action against employees implicate the NLRA's "interference" provision; no requirement that the employer's conduct actually alter the "terms and conditions" of employment, although other provisions of the NLRA, e.g., 29 U.S.C. 158(a)(3), require conduct of that nature). Nor have courts restricted the scope of the "interference" provision by reference to the more

traditional anti-retaliation provisions contained in those statutes. See, e.g., Bachelder, 259 F.3d at 1124 n.10 (noting that, despite the "semantic confusion" in some cases, the FMLA's "interference" with rights provision is a separate provision that is not construed in accordance with traditional "anti-retaliation" or "anti-discrimination" principles). Given the similarity in the language of the "interference" provisions of these statutes and the language of the ADA's "interference" provision, there is every reason to believe that Congress intended the same broad protection to apply under the ADA's "interference" provision. See generally Northcross v. Bd. of Educ. of Memphis City Schs., 412 U.S. 427, 428 (1973) (similarity of statutory language is strong indication that statutes should be interpreted in the same manner).

Indeed, the ADA's legislative history indicates that Congress was well aware of the existing standards under similar "interference" provisions and intended the "interference" provision to be applied in accordance with those standards. The issue is explicitly addressed in a Committee Report, which states that the "interference" provision should be interpreted in accordance with the regulatory interpretation "given by the Department of Housing and Urban Development to a similar provision in the Fair Housing Act." H.R. Rep. No. 485(II), 101ST Cong., 2d Sess. 138 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 421. Like the ADA, the Fair Housing Act ("FHA") makes it unlawful "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, . . . any

right granted or protected by [the Act]." 42 U.S.C. 3617. The implementing regulation referenced in the Committee Report defines unlawful conduct under the FHA provision to include such things as "[t]hreatening an employee or agent with dismissal or an adverse employment action," "[i]ntimidating or threatening any person," and "[c]oercing a person, either orally or in writing, or by other means." 24 C.F.R. 100.400. This regulation, interpreting the almost identical language of the FHA's "interference" provision, reaches a broad range of threatening or coercive conduct. The regulation comports with the broad interpretation that courts have given to the FHA's "interference" provision. See Walker v. City of Lakewood, 272 F.3d 1114, 1128 (9th Cir. 2001) ("interference" provision applies to "actions designed to coerce and intimidate [entities] into changing or ceasing their [protected] activities"); White v. Lee, 227 F.3d 1214, 1230 (9th Cir. 2000) (noting that this Court has applied the "interference" provision "broadly to cover a variety of practices that have the effect of interfering with the exercise of fair housing rights protected by the FHA"); United States v. City of Hayward, 36 F.3d 832, 835 (9th Cir. 1994) (noting that the language "'interfere with' has been broadly applied 'to reach all practices which have the effect of interfering with the exercise of rights' under the federal fair housing laws"). It is clear from the text and history of the ADA that Congress intended the ADA's "interference" provision to be similarly broad in scope.

The district court's interpretation would severely limit the protections of the "interference" provision. Under the district

court's interpretation, an employer would have license to threaten an employee with negative employment consequences as a way of dissuading the employee from exercising his rights under the ADA so long as the employer stopped just short of conduct that is sufficiently "severe or pervasive" to constitute a hostile working environment. The conduct in this case may not satisfy the "severe or pervasive" standard applicable to claims of hostile environment discrimination. But the conduct, as alleged, is precisely the kind of threatening and coercive conduct that is likely to chill employees in the exercise of statutory rights. The ADA's "interference" provision is sufficiently broad to reach the kind of threatening and coercive conduct alleged in this case.

CONCLUSION

This Court should hold that threatening or coercive conduct by an employer need not take the form of an "adverse employment decision" or be sufficiently "severe or pervasive" to meet the standard for a hostile working environment to implicate the protections of the ADA's "interference" provision.

Respectfully Submitted,

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January 29, 2002

CERTIFICATE OF COMPLIANCE

I, Robert J. Gregory, hereby certify that this brief complies with the type-volume limitations imposed under F.R.A.P. 32(a)(7)(B)(i) and F.R.A.P. 29(d). The brief contains 3,850 words.

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Robert J. Gregory

CERTIFICATE OF SERVICE

I, Robert J. Gregory, hereby certify that on this 29th day of January, 2002, two copies of the attached brief were sent by first-class mail, postage prepaid, to each of the following counsel of record:

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