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Decrying 'Culture of Sexual Harassment at Fox News,' Judge Allows Case to Proceed

A federal judge in New York City issued a decision on April 24 allowing a discrimination and retaliation lawsuit to go forward on behalf of a former guest commentator against Fox News, see *Hughes v. Twenty-First Century Fox*, Case No. 1:17-cv-07093-WHP (S.D.N.Y. Apr. 24, 2018).

By **Jeffrey Campolongo** | April 26, 2018



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A federal judge in New York City issued a decision on April 24 allowing a discrimination and retaliation lawsuit to go forward on behalf of a former guest commentator against Fox News, see *Hughes v. Twenty-First Century Fox*, Case No. 1:17-cv-07093-WHP (S.D.N.Y. Apr. 24, 2018). While this decision may not come as a surprise to many, the lawsuit “is one of many in a cavalcade

of sexual harassment suits plaguing Fox” in “the aftermath of several public reports concerning the culture of sexual harassment at Fox,” according to the recent opinion.

It has been widely reported that cable giant Bill O'Reilly separated from the network a year ago after reports of payments totaling \$13 million were made to five women who accused O'Reilly of sexual harassment. Former chairman and CEO Roger Ailes was removed from Fox just two weeks after former host Gretchen Carlson filed a lawsuit against him alleging sexual harassment. Scottie Nell Hughes, a former political commentator for various shows on Fox News, filed a lawsuit on Sept. 19, 2017, claiming that she was banned from the network and blacklisted after reporting that she was raped by Fox Business host Charles Payne. A culture of sexual harassment, indeed.

In her suit, Hughes alleges that Payne engaged in a pattern of sexual harassment, including sexual assault which started in the summer of 2013 when Payne showed up at her hotel room under the guise of mentoring her. Payne purportedly persuaded Hughes to agree to a private meeting in her room, however, instead of discussing work and career opportunities, Hughes alleges that Payne sexually assaulted and raped her. Payne promised career opportunities in exchange for a sexual relationship with Hughes. Hughes claims that a quid pro quo sexual relationship lasted over the next few years following the alleged rape.

By June 2015, Hughes severed the relationship with Payne and the consequences were felt immediately. By comparison, prior to the alleged sexual assault, Hughes had only appeared on Fox News one time, in March 2013. Over the next three years, during the sexual relationship with Payne, Hughes appeared more than 240 times on Fox programs, working on 110 full-hour appearances and more than 130 segments for almost every program aired on Fox News and Fox Business Channel. After she ended things with Payne, Hughes found herself appearing as a panelist on

only five occasions over the following 10 months. The lawsuit also alleged that Hughes and her manager later learned that Fox had blacklisted her across the industry, casting her as “not bookable” due to her affair with Payne.

Among the myriad of issues raised in a motion to dismiss, Fox News attacked Hughes’ employment discrimination and retaliation claims on the basis that she was never a Fox News employee because she was never paid by the network. Hughes countered that she was promised remuneration in exchange for her work and that “Fox encouraged her to continue appearing on its many programs, and she did so, based on Fox’s promises to retain her contractually.” She also argued that Fox News provided remuneration to her outside of traditional compensation arrangements, like the valuable opportunities to appear on nationally televised programs, bolstering her reputation as a political commentator.

The court opined that since Hughes was an unpaid guest and not a paid contributor, her work did not provide a financial benefit. If such allegations were deemed a financial benefit for purposes of determining employee status, the court wrote, “virtually every commentator on a national television network could satisfy the remuneration requirement.” A terrifying thought for political commentating platforms such as CNN, MSNBC and Fox News. The court also rejected Hughes’ argument analogizing her unpaid work to that of a college intern who is protected from sexual harassment under various state and federal laws.

While Hughes’ status as a nonemployee was fatal to some of her Title VII discrimination claims, she was nonetheless permitted to pursue failure-to-hire and retaliation claims based on her status as a job applicant. Fox News argued that Hughes never “applied for a job for which Fox was seeking applicants,” and that “mere expressions of interest in working for an employer do not constitute a job application.” The court disagreed and found that the complaint amply supported Hughes’ contention that Fox News openly entertained her expressions of interest in a full-time contributorship, and induced her into believing that she had a realistic chance of obtaining the position, despite never formally posting it.

One interesting takeaway from the court's analysis of the failure-to-hire claim is that a formal application is not always required. A plaintiff may be deemed to have applied for an open position if she pleads that the vacancy at issue was not posted, and the employee either had no knowledge of the vacancy before it was filled or she attempted to apply for it through informal procedures endorsed by the employer.

On the more salient issues concerning Hughes' retaliation claims, the court made it clear that such claims are much broader and extend beyond workplace-related or employment-related retaliatory acts and harm. Hughes need not be an employee to assert a retaliation claim under Title VII. More importantly, the court found, by rejecting Payne's ongoing sexual advances from, Hughes engaged in "protected activity."

The court acknowledged the divergent view other courts have taken with respect to this issue. Nevertheless, the court rejected those other views because "those positions overlook the complex dynamics underlying a work environment fraught with power disparities. Sexual harassment can manifest itself in many forms. Some are less obvious than others but just as invidious. Formally reporting an incident of sexual assault is one form of protected activity, but it is not always available. An individual who is sexually harassed by her supervisor, or someone with clout within the company, faces a Hobson's choice—she is either forced to endure her supervisor's unwanted overtures, or file a complaint that will inevitably bruise his ego and jeopardize her job and career."

The court sent a very clear message, one echoed by this column and other employment law attorneys, sexual harassment is less about sex and more about abuse of power. Quoting from a U.S. Court of Appeals for the Seventh Circuit case, the court said "the ability to 'blacklist' a former employee, and thus foreclose future employment possibilities, is but one example of an employer's power to punish a former employee for the exercise of her Title VII rights." see *Veprinsky v. Fluor Daniel*, 87 F.3d 881, 890 (7th Cir. 1996).

Finally, the court examined, and ultimately rejected Hughes' claim under the New York City Gender-Motivated Violence Act (GMVA) which provides that "any person claiming to be injured by an individual who commits a crime of violence motivated by gender as defined in Section 8-903 of this chapter, shall have a cause of action against such individual." The court found that Hughes failed to plead gender-specific animus. Hughes offered no specific allegations that Payne harbored or expressed any animosity toward women. In this regard, while the alleged rape in 2013, if true, is despicable and undoubtedly constitutes discrimination on the basis of sex, the court did not deem the act to be a "hate crime" motivated by gender.

That particular part of the opinion seems a bit hard to wrap one's head around, considering that rape and sexual assault of a woman is almost always inextricably intertwined with animosity toward women. In dicta, the court did offer some encouraging language on how to prove gender-based animus. Factors such as the "perpetrator's language, severity of the attack, lack of provocation, previous history of similar incidents, absence of other apparent motive, and common sense" are proper indicators of gender animosity.

It is also worth noting that earlier in the case the court rejected an attempt by Fox News to probe Hughes' sexual history including evidence of extramarital relationships. Fox News wanted to subpoena various conservative commentators for the purpose of demonstrating Hughes was a "serial seductress who engaged in a pattern of pursuing relationships with men— like Payne—for the purpose of advancing her career." Calling the tactic boorish, the judge declared that Hughes' prior sexual history had no relevance to her claims against Payne, or the defense that she used Payne to advance her career at Fox.

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