Louisiana Employment Law Letter

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Highlights

- Close the door, turn the lock, and throw away the key
- Years of service alone don't always cut it for a promotion
- Employees 'blow whistle' on employer retaliation
- Sexual comment doesn't mean sexual harassment
- 'Good-faith' effort sufficient to meet COBRA requirement

SEXUAL HARASSMENT

Close the door, turn the lock, and throw away the key

When we identify a personnel problem, what do we do? We hold meetings. We write stuff down. Maybe we even talk to our lawyer. Are we forgetting anything? Yes: the follow- through. The following case reminds us how important it is not only to identify and address personnel problems when they arise but also to follow up on the problem to make sure that it actually has been corrected. Let's take a closer look.

Door closes on office romance

The employee in this case, a female office manager employed by a hospital, entered into a consensual sexual relationship with her boss, a male doctor. Their relationship was on-again, off-again from the very beginning. After a little longer than a year, it ended in November 1993 — apparently because the doctor had resumed a prior relationship with another woman. (The case doesn't say who broke up with whom.)

Shortly following the breakup, the office manager had a hysterectomy. She experienced severe complications as a result of the surgery and took an extended sick leave from work.

The office manager alleges that when she returned to work in January 1994, the doctor began to sexually harass her. He had the locks on her desk broken and her desk drawers searched. Furthermore, egged on by the "other woman," the doctor allegedly undertook a "campaign" to prevent the office manager from doing her job. At that time, she didn't complain to anybody about those acts. She then took more time off to recuperate from her surgery.

Shortly after the office manager left work, the doctor sent her a certified letter saying she needed to return to work on the next business day or supply a doctor's note explaining why she couldn't return. The office manager did return to the hospital on the next business day, but she paid a visit to the head of its personnel department and lodged a complaint against the doctor.

Two days after the office manager returned from her leave of absence, the doctor filled out a "staff counseling report." The report effectively demoted her to administrative assistant, taking away many of her job duties. It also accused her of being verbally abusive to office personnel. On receiving the report, the office manager immediately contacted the head of the hospital's personnel department and complained. The head of personnel placed her on a four-day administrative leave of absence with pay. Next, the personnel head scheduled a meeting with the doctor and told him that the staff counseling report (*i.e.*, the demotion) violated company policy and was to be withdrawn.

When the office manager returned to work, her problems continued. She allegedly overheard the doctor and his current paramour "plotting" to reorganize their department and strip her of her remaining job responsibilities. Shortly thereafter, she made a formal complaint to the hospital's equal employment opportunity (EEO) office. As a result, she was placed on another paid administrative leave.

Shortly following the office manager's departure on leave, a representative from the hospital's EEO office met with her and the doctor. The EEO representative formally reinstated her job duties.

Again, when the office manager returned to work, she continued to complain to both the EEO office and the personnel department, contending that her job duties hadn't actually been restored and that the doctor was continuing to alter her job. Again, she was placed on paid administrative leave.

Eventually, the hospital's personnel department sent the office manager a letter stating that she had to return to work by April 11, 1994 (the date on which she exhausted her allowance of paid leave). On that date, however, she replied to the personnel department that she could no longer work with the doctor because it was having a "deleterious effect on her mental health." She took that step at the direction of her psychotherapist, who had diagnosed her with suicidal ideation and mood and anxiety disorders.

The office manager never returned to work. She remained on paid administrative leave until July 1, 1994, at which point she began receiving disability benefits. The hospital never terminated her.

Courts open door for employee

The office manager sued the doctor and the hospital in federal court, alleging sexual harassment and retaliatory discharge under Title VII of the Civil Rights Act of 1964, intentional infliction of emotional distress, and other claims under Louisiana law. The trial court dismissed all of her claims except her sexual harassment and retaliatory discharge claims against the hospital. It also ruled out the possibility of punitive damages.

At trial, the jury found in the office manager's favor and awarded $300,000 in compensatory damages. The court added $124,637 in back pay, $4,287 in front pay, and more than $330,000 in attorneys' fees and costs. For those counting, the total came to over $750,000 — without a penny of punitive damages.

Both the hospital and the office manager appealed the judgment to the U.S. Fifth Circuit Court of Appeals, which covers Louisiana employers. The hospital argued that the trial court made

several different errors, and the office manager argued that the court shouldn't have ruled out the possibility of punitive damages.

Not an open-and-shut victory

In sexual harassment cases arising under Title VII, an employer is allowed to completely avoid being held liable for the bad acts of its employees if it can show three things:

1. it exercised reasonable care to prevent and promptly correct any sexually harassing behavior;

2. the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer; and

3. the employee hasn't been subjected to a "tangible employment action."

The hospital argued that it should be allowed to escape liability for the doctor's bad acts because the office manager never suffered a tangible employment action (after all, she was only demoted, and she was kept on paid leave). The Fifth Circuit rejected that argument, however, reasoning that the office manager's demotion, even though immediately rescinded and corrected by the hospital's personnel department, constituted a tangible employment action. Consequently, the hospital wasn't allowed to escape liability.

The hospital also contended that it shouldn't be held accountable for the doctor's conduct because although arguably rude and unpleasant, his treatment of the office manager wasn't based on the fact that she's a woman. The hospital argued that the alleged harassment wasn't sexual in nature and was — at most — a result of personal animosity arising out of a failed personal relationship.

The court rejected the hospital's argument because the office manager had testified that it was only after her consensual relationship ended that the doctor began to harass her. According to the Fifth Circuit, that fact alone supports the inference that the doctor harassed her because she refused to continue to have a sexual relationship with him — which is textbook sexual harassment.

The Fifth Circuit also refused to reverse the trial court's ruling on the retaliatory discharge claim. According to the federal discrimination laws, it's illegal to take an adverse employment action against an employee because she has engaged in "protected activity" (which includes complaining about being sexually harassed at work). The hospital argued that the office manager never suffered an adverse employment action. Specifically, it contended that changing her desk locks, restructuring office procedures, clarifying her job duties, and taking disciplinary actions against her in the form of reprimands didn't constitute adverse employment actions. The Fifth Circuit agreed with the hospital on those issues, but it reasoned that the office manager's "demotion" constituted an adverse employment action. Even though the hospital formally restored her job duties, in practice, she never regained them.

Ironically, when it came to punitive damages, the Fifth Circuit agreed with the trial court's ruling that the hospital had made a good-faith effort to comply with the federal discrimination laws. Among other things, it noted that the hospital acted in good faith by maintaining a written policy in its employee handbook prohibiting sexual harassment, placing the office manager on paid administrative leave several times, holding several meetings in an attempt to resolve the complaints, rescinding the doctor's performance evaluation of the office manager, and reinstating

(verbally) her job duties. Moreover, the hospital was on record for informing the doctor that his conduct was inappropriate. Unfortunately for the hospital, all of those factors added up to a finding of good faith but did nothing to change the finding of liability. *Green v. Administrators of the Tulane Educational Fund*, No. 00-30530 and No. 00-31118, 2002 U.S. App. LEXIS 4197 (5th Cir. Mar. 15, 2002).

Be a closer!

In addition to reminding us about all that can go wrong with an office romance, this case teaches us the importance of closing the door and turning the lock on sexual harassment and retaliatory discharge liability. The hospital was a conscientious employer. As noted by the Fifth Circuit, its personnel department did many things right. All that effort and good work on the hospital's part, and what does it have to show for it? Over $750,000 lost in damages, attorneys' fees, and costs.

The hospital went a long way toward defusing the office manager's retaliation and sexual harassment claims, but it never closed the door all the way. The key to liability in this case was the office manager's demotion. Had she not been demoted, the hospital might have been able to escape liability on its sexual harassment claim and the retaliatory discharge claim (via no adverse employment action).

When you catch a problem early, as the personnel manager did in this case, it's crucial to take corrective action. The hospital did the right thing by nullifying the doctor's negative performance review and instructing the office manager and the doctor that her original job duties had been reinstated.

What failed to occur, however, was the "follow-through." When you give a corrective instruction, institute objective measures to make sure that your instruction has been followed. For example, schedule a follow-up meeting for one week after the corrective instruction is handed down, and let the parties know that there will be consequences if they fail to carry out your instructions. Finally, document all of your corrective and follow-up measures. In the end, you might just be the closer and save your employer a whole bunch of money.