

Louisiana Employment Law Letter

H. Mark Adams, Editor; Sidney F. Lewis V and Jennifer L. Anderson, Associate Editors

November 2001

Vol. 10, No. 8

Highlights

- Weakest link: no connection between sexual harassment complaints and job loss
- Mauled employees have no case against the mall
- Terror at home and how it affects the workplace
- No pay for donning and doffing safety gear
- Nonunion employees may still bring a co-worker to meetings

RETALIATORY DISCHARGE

Weakest link: no connection between sexual harassment complaints and job loss

Most employers and supervisors know it's unlawful to fire, demote, or take other adverse employment actions against an employee who engages in activity protected by law. For instance, an employee who complains of sexual harassment or assists a co-worker in making such a complaint has engaged in "protected activity" for which she cannot be fired, demoted, or so on. Even if the complaint can't be substantiated, the employee who made or assisted in making it is still protected from having her pay decreased, being demoted, or losing her job as a result of her involvement in the complaint process.

A federal court jury in Texas recently awarded more than \$500,000 to a former university employee who claimed she lost her job because she helped five female co-workers file internal sexual harassment complaints. But the U.S. Fifth Circuit Court of Appeals, which covers Louisiana, saw no evidence of a link between the "protected activity" and the employee's firing and reversed the jury's verdict. To find out how you can avoid a close call like this one, let's play "The Weakest Link."

What do archiving core samples and filing harassment complaints have in common?

Nothing really, but that didn't stop one employee from tackling both tasks. For 12 years, Christine Mato served as the supervisor of curation and repositories at Texas A&M University's ocean drilling program. She was responsible for archiving the ocean core sample collection and reviewing scientists' requests to research the samples. She reported directly to Russ Merrill, the manager of information services and curation. He was responsible primarily for information services and delegated most of his curatorial duties to Mato.

Mato also spent her time helping female co-workers submit internal sexual harassment complaints against certain staff members in the program. She complained that Jack Baldauf, the program's associate director, wasn't responding quickly enough to one of the complaints.

Baldauf, on the other hand, believed he was pursuing the complaint expeditiously and was frustrated with her accusation. According to Mato, a university administrator, Rick McPherson, told her that one of the sexual harassment complaints was an embarrassment to the program.

The program hired Jeff Fox as its new director. He developed a reorganization plan because the international committee overseeing the program believed it was operating inefficiently. He advised his staff in memorandums that budget cuts were likely. To improve efficiency and reduce expenses, he hired a consulting firm to study the program and recommend changes.

Eventually, Fox completely reorganized the program. He placed Baldauf in charge of carrying out the changes with the assistance of Jan Radle, McPherson's assistant. Radle was responsible for preparing the job descriptions for the positions in the reorganized program.

Is archiving core samples really rocket science?

Perhaps. Early on, Fox decided the curatorial positions held by Mato and Merrill should be consolidated and the new curator should have a Ph.D. Baldauf did not play any role in making that decision. According to Radle, the job descriptions for Mato's former position and the new curator position were virtually identical except for the Ph.D. requirement.

Radle believed the new Ph.D. requirement could be viewed as an attempt to "target" Mato, who had only a bachelor's degree and some graduate study. Radle expressed her concern to Fox and Baldauf, who reportedly told her that Mato would not become the new curator. Radle also claimed McPherson appeared pleased when she told him about the proposed changes in the curatorial division.

Radle forwarded the proposed job description for the new curator position to human resources, which questioned the similarity between Mato's old job and the new position and the plan to end her employment. Human resources then called a "risk assessment" meeting with Fox and Baldauf.

Fox explained that the Ph.D. requirement was necessary because of the program's focus on research and science operations. He also pointed out that almost all curators at similar programs hold a Ph.D., regardless of the job requirements. Human resources recommended that he and Baldauf research the job requirements for curators at similar programs.

Baldauf instructed Radle and Merrill to contact NASA's moon rocks program to determine whether its curators were required to hold a Ph.D. According to Baldauf, Merrill told him NASA required a Ph.D. for its curators. According to Radle, however, NASA said a Ph.D. was "preferred" but not required because it would have excluded some of the program's existing curators.

Radle also claimed Baldauf "massaged" the job description after the risk assessment meeting to justify the Ph.D. requirement. He added duties such as developing a long-range sample distribution policy, "interacting with the science community," and "exercising proper scientific oversight" for the technical staff. When Baldauf and Radle finally completed the job description for the new curator position, human resources approved.

At about the same time, the consulting firm completed its research and prepared a lengthy report setting forth its recommendations. The firm suggested that curatorial services be more closely

aligned with the program's science operations. The report explained that the curatorial function "must carefully balance providing the maximum science that can be obtained from the [core samples] while preserving them for decades until new scientific technology enables even more information to be gleaned." The report also recommended that the manager of curatorial services "combine in-depth scientific knowledge with adroit management and people skills to achieve this balance."

The report never mentioned a Ph.D. requirement, but Fox interpreted the recommendation for a "scientist" to call for a research scientist with a Ph.D. who had published extensively in peer-reviewed journals.

As a result of the reorganization, 14 jobs were eliminated, five were created, 16 were modified, and 40 were relocated within the program. The jobs held by Mato and Merrill were eliminated, but the latter remained at the program to head the information services division. Mato applied for the new curator position, but her application was rejected because she didn't have a Ph.D.

How much does retaliation cost an employer?

Lots. Mato sued the university, alleging that she wasn't hired as the new curator because of her sex and in retaliation for helping female co-workers file internal sexual harassment complaints. The case went to trial before a federal court jury. The jury found the university did not discriminate against Mato because of her sex but *did* deny her the curator position in retaliation for her protected activity.

Weakest link breaks under Fifth Circuit's scrutiny

On appeal, the Fifth Circuit explained that to prove unlawful retaliation, Mato had to show she would not have lost her job "but for" her actions to assist female co-workers in filing internal sexual harassment complaints. In other words, it wasn't enough for her to show that her protected activity was a factor in denying her the curator position. Rather, she needed to prove the university would not have denied her the job in the absence of her protected activity.

Mato argued that Baldauf and McPherson, who knew of her involvement in the earlier sexual harassment complaints, prevailed on Fox to eliminate her former job and impose the Ph.D. requirement on the new curator position. She argued that the Ph.D. requirement was unnecessary and was just a smoke screen designed to hide an unlawful retaliatory motive. She relied exclusively on Radle's testimony that:

- Baldauf was "in charge" of the reorganization;
- he "massaged" the curator job description after the risk assessment meeting to justify the Ph.D. requirement; and
- McPherson appeared pleased with the results of the reorganization.

The Fifth Circuit observed, however, that Radle's testimony merely confirmed that Baldauf and McPherson were "involved" in the reorganization process, not that they were responsible for the decisions to consolidate the curatorial positions or require a Ph.D. for the new job. Moreover, Radle testified that Fox alone made the decisions. According to the court, there was no evidence that either Baldauf or McPherson influenced those decisions. Rather, their roles were limited to

carrying out Fox's decisions. More important, Mato did not offer any evidence that Fox had a retaliatory motive in consolidating the jobs or adopting the Ph.D. requirement.

On the other hand, the university explained that it reorganized the program because of external pressure to improve efficiency and reduce costs and that Fox's overriding focus was science operations. Additionally, the consulting firm independently reached the conclusion that the new curator should have a Ph.D. The court explained, "[W]e have repeatedly and emphatically stated that anti-discrimination laws 'are not vehicles for judicial second-guessing of business decisions,'" and an employee's disagreement with an employer's business decision is not enough to prove discrimination or retaliation.

Finally, the court explained that the period of time between the protected activity and the reorganization plan -- 18 months -- was too tenuous to link them together. Thus, Mato fell short of showing that "but for" her involvement in the earlier sexual harassment complaints, she would not have lost her job. *Mato v. Baldauf, et al.*, 2001 WL 1117321 (9/9/01).

Bank this lesson, and avoid playing 'The Weakest Link'

Avoiding close calls like the one we've just reported is simpler than you may think. When you consider making an employment decision that will adversely affect an employee, first consider *why* you want to make the decision. Is business slowing down? Are you just tightening your belt? Does the employee have a history of uncorrected performance problems? Or did she engage in workplace misconduct?

Next, ask yourself if you could show a jury why the decision is necessary. Do your financial reports reflect decreased revenues or excessive debts or expenditures? Have you documented the employee's performance problems through written evaluations, warnings, or performance improvement plans that you have shared with her? Did your employee have a reasonable opportunity to improve her performance? Did you investigate the workplace misconduct? And did witnesses or documentation confirm the problem?

While there certainly may be circumstances when immediate firing or other action is justified, you can reduce the risk of lawsuits -- or perhaps avoid them altogether -- by carefully evaluating your employment decisions and making sure you have legitimate reasons to support them. Timing doesn't necessarily determine of whether an adverse employment action is retaliatory, but demoting or firing an employee on the heels of protected activity will certainly create a stronger link between them than a lengthy period of time.

Finally, if you delegate decisionmaking authority to your supervisors, it's essential to implement a system of checks and balances to make sure their decisions are consistent and in compliance with your policies and the law.

Copyright 2001 M. Lee Smith Publishers LLC

LOUISIANA EMPLOYMENT LAW LETTER does not attempt to offer solutions to individual problems but rather to provide information about current developments in Louisiana employment law. Questions about individual problems should be addressed to the employment law attorney of your choice. The State Bar of Louisiana does not designate attorneys as board certified in labor law.