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Employer Receives Favorable Jury Verdict in Retaliation and Wrongful Termination Case

by J. Kevin West

We are pleased to announce that partner J. Kevin West of Hall, Farley, Oberrecht & Blanton, P.A., received a favorable verdict on behalf of an employer in a recent six day jury trial in federal court. The facts of this case are instructive for all employers.

In November 2003, Jane Doe was employed in a senior management position with the employer, XYZ Company (names are being changed to protect confidentiality). XYZ was a large employer with over 500 employees at 30 locations throughout the state of Idaho. During the 2000's, XYZ was experiencing tremendous growth. During the first few years of her employment, Jane Doe was able to perform her duties at a minimally satisfactory level. She received annual pay raises, which were the same as other management level employees, but were nevertheless documented as "merit increases." She received no written warnings, nor was there any negative documentation in her personnel file. Her one and only formal employee evaluation was positive.

As XYZ continued its explosive growth, Jane Doe began to experience difficulties in satisfactorily completing her job duties. In late 2006, XYZ's CEO transferred about one-third of Doe's duties to another employee in order to help Doe satisfactorily complete her job duties. She continued, however, to experience difficulties. In addition, her personal behavior in the workplace was, at times, inappropriate. She frequently engaged in inappropriate sharing of details from her personal life, even confiding intimate sexual details about her relationships to some of her co-workers. Doe also chaired several committees within XYZ and failed to properly manage these committees, all to the detriment of the organization. There were rumblings of discontent from other senior managers at XYZ, but none of these were ever formally documented in Jane Doe's personnel file.

In mid-2007, Jane Doe's immediate supervisor suggested to her that she should begin "looking for work elsewhere." In fact, Jane Doe had been sending out résumés for over a year prior to this conversation, and she redoubled those efforts after this conversation occurred. On October 26, 2007, as part of a restructuring of XYZ, Jane Doe was placed under the supervision of John Smith, the Director of Administrative Services at XYZ Company. Jane Doe did not like Smith and was very unhappy to be placed under his supervision, since they had previously been peers at XYZ. Immediately after becoming Jane Doe's supervisor, Smith instituted a "360 degree review," in which he solicited feedback from 11 senior managers in the company to evaluate the performance of Jane Doe and two others within her department. The 360 degree review was used by Smith not as a disciplinary tool, but as an attempt to obtain a baseline of performance for Jane Doe and others as he became their new supervisor and was seeking to improve overall performance in the organization. Of the 11 evaluations in the 360 degree review, 7 were very negative towards Jane Doe and the other 3 or 4 were merely satisfactory.

John Smith met with Jane Doe on October 26 and October 29, 2007, and shared the results of the 360 degree review. Smith told Doe that her job was in jeopardy unless there was immediate improvement. This conversation, and the warning, were not documented in Doe's personnel file. Nor was the 360 degree review placed in Doe's file. A few days later, on October 31, 2007, Jane Doe requested a meeting with Smith. During this meeting, Jane Doe revealed, for the first time, that she had allegedly been sexually assaulted by a co-worker some six weeks earlier. She told Smith that the co-worker, whom she initially refused to name, had come into her office, engaged in a sexually tinged conversation with her and, at the end of the conversation, had exposed himself to her and placed his arms on her shoulders in an attempt to draw her towards him. Despite the fact that the organization had a sexual harassment policy requiring employees to report such behavior, and despite the fact that Jane Doe was well aware of the policy and even had some responsibility for enforcing it, she had failed to bring this incident to the attention of management for nearly six weeks prior to October 31, 2007.

XYZ Company began an immediate investigation of Doe's allegations. It hired an outside investigator to interview relevant personnel and provide a report and findings. At the end of the investigation, the results were inconclusive. It was determined that the only persons present at the time of the alleged exposure incident were Jane Doe and the alleged perpetrator. There were suspicions, however, regarding Jane Doe's credibility because she had not brought forward her allegations until after she was told that her job was in jeopardy. Nevertheless, the company met separately with Jane Doe and the alleged perpetrator, told them that the investigation was inconclusive, and advised that they were not to be alone with each other in the workplace. Because it had been revealed in the investigation that there had been an ongoing series of sexual conversations between Jane Doe and the alleged perpetrator, they were both warned not to have any further such conversations in the workplace. Subsequent to this, there were no further incidents between Jane Doe and the alleged perpetrator.

Following the investigation of Doe's allegations of sexual harassment in November 2007, her new supervisor, John Smith, began attempting to implement corrective measures in order to respond to the serious performance concerns expressed in the 360 degree review. Jane Doe resisted these efforts, which included changing some of her duties and placing greater restrictions on her outside activities during work hours. Previously, Jane Doe had had great flexibility in how and where she performed her duties. With John Smith taking over as supervisor, however, things changed, and he took on a much more aggressive supervisory role with regard to Jane Doe. Friction developed very quickly and Doe began accusing Smith of "retaliating against her" for having raised allegations of sexual harassment. Doe made the allegations of retaliation through a series of e-mails which she sent to Smith in December and January. On one of these e-mails, she blind carbon copied the CEO of the company. Though a very competent manager, Smith was not sophisticated in HR matters, and dismissed the claims of retaliation as simply being Jane Doe's resistance to his efforts to correct her job performance. He did not conduct any investigation of her allegations, nor did he meet with Doe to discuss the issue or take it to the company's CEO. Though he had been copied on one of Doe's e-mails, XYZ's CEO did not respond or follow up in any way because he also believed that Jane Doe was merely complaining about the change in her job duties.

In February 2008, matters reached a head when there were a series of incidents between Jane Doe and John Smith, which led to a disciplinary meeting and the issuance of a written warning on February 12, 2008. Jane Doe reacted angrily at the disciplinary meeting, cursed at Smith, and otherwise refused to respond to the written warning that she was given. Two days later, after a minor act of insubordination, Jane Doe was terminated.

Following Doe's termination, she filed a charge of discrimination with the Idaho Human Rights Commission and later filed suit against XYZ Company in federal court. In her lawsuit, she sued both XYZ Company and the alleged perpetrator of the sexual harassment. Her lawsuit included claims for assault and battery, sexual harassment, retaliation, and wrongful termination.

During the lengthy litigation which followed, XYZ filed a motion to dismiss all of Jane Doe's claims. After a hearing and oral argument, the federal judge determined that the sexual harassment claim was without merit. He ruled that there was only a single alleged incident of misconduct and that Jane Doe had failed to timely notify the company of the incident. When the company was notified, it immediately responded by conducting an investigation and taking action to ensure that there was no further offensive conduct. In fact, there was no repeat of any further harassment. Even though the alleged exposure incident was somewhat severe in nature, the federal judge stated that this single incident was insufficient to establish a "hostile environment," and thus there was no legal basis to allow the sexual harassment claim to continue. Because the sexual harassment was allegedly done by a co-worker (and not a supervisor), there was a higher burden of proof and Jane Doe was unable to meet that burden. Accordingly, her claim of sexual harassment was dismissed.

The remaining claims proceeded to a jury trial against XYZ Company and its employee. Our law firm defended the company and its employee at the trial. After a six day trial, the jury returned a verdict in favor of XYZ Company and its employee. The jury did not believe Jane Doe's allegations of assault and battery as to the alleged exposure incident with the XYZ Company employee. Presumably, a major factor in this conclusion was the fact that Doe had failed to promptly report the allegations, and had only done so once her job was in jeopardy. As to XYZ Company, the primary claim litigated during the trial was her allegation of retaliation by supervisor John Smith. Ms. Doe presented evidence at the trial showing various actions by Smith which impacted her job duties, including restrictions on her outside activities, limitations of her job duties and privileges, and other corrective measures taken against her. She also alleged that Smith was mean to her, berated her in front of others, and otherwise bullied her. In defending XYZ Company, however, we showed that Smith's corrective actions began prior to Jane Doe making any allegations of sexual harassment. Indeed, the genesis of Smith's actions was the 360 degree review, which was conducted days before Doe's allegations were revealed. Although it was a close case, the jury ultimately determined that there was no basis for Doe's claims of retaliation and rendered a verdict in favor of XYZ. The jury, in subsequent interviews, was troubled by the fact that there was a lack of documentation of poor performance in Doe's personnel file. Despite this, however, they clearly perceived that the corrective actions being taken by the supervisor were in response to a pattern of poor performance which had predated any allegations of sexual harassment.

Concluding Comments

Even though Jane Doe's claims were found to be without merit, she was allowed to proceed to a jury trial because there were significant questions that had to be litigated as to whether she was truly terminated due to her job performance or because of retaliation. XYZ Company had not done a good job of documenting Doe's performance problems which had existed for some time prior to the termination. Indeed, there were no negative evaluations or written warnings in Jane Doe's personnel file until two days before her termination. Furthermore, the company did not respond to her claims of retaliation. Optimally, the company should have investigated the allegations of retaliation and ensured that there was no such conduct occurring in the workplace. Instead, the company ignored the allegations and assumed (albeit correctly) that Jane Doe was playing the retaliation card to fend off the corrective actions of her supervisor. The case of Jane Doe vs. XYZ Company is thus another reminder of the importance of documentation in an employee's personnel file in establishing both the grounds for termination, as well as disproving allegations of retaliation.